

2012 IL App (1st) 101659-U

FIRST DIVISION
DATE 3-26-12

No. 1-10-1659

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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. 09 CR 15240
)	
YARII A. MASSEY SR.,)	Honorable
)	Domenica A. Stephenson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the circuit court entered an order summarily dismissing defendant's post-conviction petition within the 90-day period allowed by statute, and defendant's petition failed to state the gist of a constitutional claim, we affirm the judgment of the circuit court.
- ¶ 2 Defendant Yarii A. Massey Sr. appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that the trial court failed to enter an order of summary dismissal within the requisite 90-day period. In the alternative, defendant contends that the circuit court

improperly summarily dismissed his claims because it erroneously held that waiver and *res judicata* barred the claims in his petition, and applied the wrong standard of review in reaching its decision. We affirm.

¶ 3 The record shows that defendant was arrested by Police Officers Prieto and Stapleton after Prieto saw defendant place an object containing narcotics into a fence near 5610 South Michigan Avenue in Chicago about 4:30 p.m. on July 26, 2009. Following a bench trial where defendant represented himself *pro se*, defendant was found guilty of two counts of possession of a controlled substance (cocaine and heroin) and sentenced to concurrent terms of five years' imprisonment on January 14, 2010. Defendant never filed a direct appeal.

¶ 4 Defendant subsequently submitted a *pro se* post-conviction petition, which bears the stamp "received" by the clerk's office on February 4, 2010. The petition contains no other stamps, and the memorandum of orders does not include any entry for the petition other than its dismissal.

¶ 5 In the petition, defendant alleged that there was no probable cause for his arrest, the State presented coerced, conflicting, and perjured testimony to convict him, his conviction resulted in cruel and unusual punishment, and he was denied trial transcripts. Defendant attached "Affidavits" that were signed by him, but not notarized. In these documents, defendant further detailed what he believed to be the conflicting testimony, attempted to discredit the testimony of police officers, and stated that another individual was with him at the time of his arrest.

¶ 6 On May 13, 2010, the circuit court dismissed defendant's petition, noting that the petition was filed on February 24, 2010, and was "before the court for an initial determination of its legal sufficiency." The court held that because defendant failed to file a direct appeal, all claims challenging insufficient probable cause for arrest, illegal search and seizure, and coerced and conflicting statements of witnesses were barred by waiver. The circuit court also held that

defendant did not plead a sufficient perjury claim. In doing so, the circuit court stated that defendant failed to "substantiate his allegations with specific facts," and also failed to show a reasonable likelihood that the alleged false testimony could have affected the outcome at trial.

¶ 7 On appeal, defendant contends that the circuit court improperly dismissed the petition beyond the 90-day period allowed by statute. We review the summary dismissal of defendant's post-conviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 8 Defendant relies on the "received" stamp dated February 4 which would render the court's dismissal on May 13 beyond the 90-day deadline by 9 days. The State responds that February 24 is the operative date because the circuit court specifically stated in its written order that this post-conviction "petition was filed on February 24," and thus, the court's dismissal on May 13 was well within the 90-day time period. We agree with the State.

¶ 9 The Act expressly provides that a court can summarily dismiss a petition "[w]ithin 90 days after the filing and docketing of" the petition. 725 ILCS 5/122-2.1 (West 2010). The 90-day provision is mandatory. *People v. Porter*, 122 Ill. 2d 64, 85 (1988). A summary dismissal order after the 90-day period is void. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006), relying on *Porter*, 122 Ill. 2d at 86.

¶ 10 In *Brooks*, the supreme court interpreted this provision and found that "the verb 'docket' connotes more than the mere act of receiving the petition, as defendant suggests." *Brooks*, 221 Ill. 2d at 391. Accordingly, as a matter of law, defendant's reliance on the February 4 stamp "received" cannot trigger the 90-day statutory period under the Act.

¶ 11 The trial court, however, declared in its written order that the subject petition was "filed" on February 24. Relying on *Brooks*, the date noted on a "filed" stamp was deemed to start the 90-day period. *Gibson v. People*, 377 Ill. App. 3d 748, 751 (2007). In light of the undisputed absences of any entry in the half-sheets for the filing of the petition and of any other date stamp

on the petition other than "received," we find that the date provided by the trial court should prevail because, under *Brooks*, we cannot use the "received" date as suggested by defendant and we will not presume that the trial court misstated the date unless the record affirmatively rebuts it. See *People v. Howery*, 178 Ill. 2d 1, 32 (1997).

¶ 12 Contrary to defendant's contention that our finding is simply deferential to the trial court rather than an application of *de novo* review, we determine the propriety of the order on appeal *de novo* based on the entire record and proceedings. The burden to show error is, as always, on defendant as the appellant and defendant failed to support its contention that the February 4 "received" date should control as a matter of law and failed to establish that the trial court erred in its finding of the date of filing as February 24.

¶ 13 Moreover, February 24 is identified as the filing date of the subject petition according to the electronic report generated from the Clerk of the Circuit Court of Cook County's Passport System. The State appended this report to its response brief to confirm the trial court's reference to February 24 as the filing date and asserts that this court may take judicial notice of the record. Although we have already determined from the trial court's written order that the date of filing was February 24, we view defendant's objections to our consideration of the electronic record particularly unpersuasive because court records have long been held to be subject to judicial notice. *Vulcan Materials Co. v. Bee Const.*, 96 Ill. 2d 159, 166 (1983); *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976); *Boston v. Rockford Memorial Hospital*, 140 Ill. App. 3d 969, 972 (1986). Nevertheless, even without the clerk's electronic record, our conclusion remains the same, *i.e.*, the court did not exceed the 90-day limit to summarily dismiss defendant's post-conviction petition.

¶ 14 In the alternative, defendant contends that the circuit court improperly held that waiver and *res judicata* barred all of his claims, the summary dismissal order only addressed the merits of his perjury claim, and the court applied the wrong standard to its consideration.

¶ 15 Although defendant correctly identifies the standard of review as *de novo* (*Hodges*, 234 Ill. 2d at 9), his arguments attacking the reasoning employed by the circuit court fail to recognize the implications of *de novo* review. We may affirm or reverse on any basis supported by the record, even if the circuit court reasoned incorrectly. *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006). Accordingly, even though some of the circuit court's analysis was incorrect, as conceded by the State, the issue before us is whether defendant's petition was sufficient to survive summary dismissal. For the following reasons, we conclude that it is not.

¶ 16 The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. Nevertheless, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d at 10.

¶ 17 Here, defendant claims that he alleged at least one claim which is not completely fanciful or delusional, *i.e.*, that police committed perjury by lying about the presence of others at the scene of the crime. The State, however, maintains that defendant failed to attach any notarized affidavits to support his claim that the police officers presented perjured testimony. The defendant counters in his reply brief that notarized affidavits are not essential for first stage

review where his petition and affidavit refer to his own previously-sworn testimony on the subject of the officers' perjured testimony. Consistent with his affidavit, defendant maintains that the record shows attempted cross-examination about alleged discrepancies in a police report, conflicts in the testimony of the officers, and his attempt to introduce and subpoena a witness to impeach an officer's testimony that he was alone at the time of his arrest.

¶ 18 Despite defendant's contentions to the contrary, however, he could have provided support for his allegations that the police presented perjured testimony. For instance, an affidavit of the individual who was allegedly with him at the time of the crime, and the police report which, according to defendant, indicated that another person was with him would have provided the requisite support. The purpose of the affidavit or other evidence requirement in the Act is to establish that a petitioner's allegations are capable of objective or independent corroboration. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶55. Here, the absence of an affidavit from the person allegedly with defendant when the crime occurred and the police report shows that defendant failed to establish that his allegations were capable of objective or independent corroboration.

¶ 19 The crux of defendant's perjury claim stems from Officer Prieto's testimony that defendant was standing alone when Prieto first saw him and then observed him placing the narcotics in the fence. Defendant's position both at trial and in the post-conviction petition is that he was not standing alone. In pretrial discovery, defendant's counsel listed as a possible witness Randy French with a specific address. Before trial, defendant, who was by then proceeding *pro se*, informed the trial court that he wanted to present a LEADS report from the police which would indicate that he was not alone. Defendant further explained that no subpoena had issued to this person, who apparently is Randy French, because "the individual that was standing with me, I guess he [is] scared thinking that he can be charged with this as well." The court explained

to defendant that police reports and LEADS reports are not admissible. Nevertheless, Officer Prieto testified at trial that "other people were on the sidewalk in different areas" where defendant was standing. Accordingly, Prieto acknowledged that defendant was not "alone" in the sense that no one else was around at 4:30 p.m. but rather was standing by himself and acted alone. Defendant's perjury allegation as stated in his petition simply has no basis in fact or in law.

¶ 20 Furthermore, defendant's remaining allegations do not state even the gist of a constitutional claim. In his petition, defendant specifically states,

"That there was a substantial violation of the defendants [*sic*] constitutional rights under the constitution of the United States *** in that the arrest was made with no probable cause and states [*sic*] used coerced, conflicted statements and perjured testimony to get the defendant convicted resulting in cruel and unusual punishment, double jeopardy sentencing. Denial of trial transcripts at this stage."

¶ 21 Defendant's contentions fail to specify how the arrest was made without probable cause, what statements were coerced, and how his punishment was cruel and unusual. These conclusory and fanciful assertions, no matter how liberally construed, are subjective and lack any specific content. See *Wilborn*, 2011 IL App (1st) 092802, ¶54 (a petition "cannot consist of nonfactual and nonspecific assertions that merely amount to conclusions that error occurred at trial"). We thus find that defendant's petition was properly dismissed at the first stage because it lacked the requisite supporting documentation and failed to state the gist of a constitutional claim. Accordingly, we affirm the judgment of the circuit court.

¶ 22 Affirmed.

1-10-1659