

NOTICE
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2012 IL App (4th) 100369-U

Filed 4/5/12

NOS. 4-10-0369, 4-10-0370, 4-10-0371 cons.

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ANTHONY GAY,)	Nos. 03CF60
Defendant-Appellant.)	03CF61
)	03CF62
)	
)	Honorable
)	Robert M. Travers,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because the defendant's arguments had been considered and rejected in another case, the appellate court affirmed the trial court's second-stage dismissal of the defendant's amended and supplemental petitions for postconviction relief.
- ¶ 2 In November 2008, defendant, Anthony Gay, filed an amended petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)), which he later supplemented, alleging various constitutional deprivations associated, in part, with his three convictions for aggravated battery in the following Livingston County cases: Nos. 03-CF-60, 03-CF-61, and 03-CF-62. Following a November 2009 second-stage hearing, the trial court dismissed defendant's amended and supplemental petitions for postconviction relief, finding that defendant failed to allege a substantial violation of a constitutional right.

¶ 3 Defendant appeals, arguing that the trial court erred by dismissing his amended and supplemental petitions for postconviction relief because he made a substantial showing that (1) his aggregate sentence in this and other unconsolidated cases violates the constitutional prohibition against cruel and unusual punishment, (2) the State subverted his constitutional rights to due process and a speedy trial by tactically delaying certain indictments, and (3) the Department of Corrections (DOC) citations issued to defendant for his conduct did not provide sufficient notice that the same conduct could expose him to criminal prosecution for aggravated battery. Because this court has previously considered and rejected these same arguments of defendant in *People v. Gay*, 2011 IL App (4th) 100009, 960 N.E.2d 1272, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2003, the State charged defendant with three separate counts of aggravated battery (720 ILCS 5/12-4(b)(6) (West 2002)) that occurred on (1) July 23, 2000 (case No. 03-CF-60), (2) July 30, 2000 (case No. 03-CF-61), and (3) July 19, 2000 (case No. 03-CF-62), while defendant was an inmate at the Pontiac Correctional Center. (Defendant is now an inmate at the TAMMS Correctional Center.) In each case, the State alleged that on a specific date, defendant knowingly made physical contact of an insulting or provoking nature with a particular DOC employee by throwing a liquid substance on the employee, knowing that the employee was a correctional officer engaged in the execution of his official duties.

¶ 6 In January 2004, a jury convicted defendant of aggravated battery in case No. 03-CF-60. Following separate trials conducted in April 2004, a jury convicted defendant of aggravated battery in case Nos. 03-CF-61 and 03-CF-62.

¶ 7 On June 6, 2005, defendant *pro se* filed a petition for postconviction relief under

the Act. Following a July 22, 2005, hearing and without ruling on defendant's postconviction petition, the trial court imposed six-year sentences for each of defendant's three aggravated battery convictions, to be served consecutive to (1) each other and (2) sentences the court had previously imposed in other cases.

¶ 8 Defendant appealed his conviction in all three cases, and this court affirmed. See *People v. Gay*, No. 4-05-1012 (Apr. 10, 2007) (unpublished order under Supreme Court Rule 23) (affirming defendant's conviction and sentence in case No. 03-CF-60); *People v. Gay*, No. 4-05-1073 (Mar. 18, 2008) (unpublished order under Supreme Court Rule 23) (affirming defendant's convictions and sentences in case Nos. 03-CF-61 and 03-CF-62).

¶ 9 In November 2008, defendant filed an amended petition for postconviction relief under the Act. In his amended petition, defendant listed 17 different convictions—which included the 3 convictions at issue—and the associated sentences imposed, contending that the citations DOC issued for his conduct during those different occasions did not provide him sufficient notice that the same conduct could expose him to criminal prosecution. Defendant also contended that the State subverted his constitutional rights to due process and a speedy trial by tactically delaying certain indictments. In support of that claim, defendant listed, in part, the date the State (1) alleged that he committed a crime and (2) charged defendant for that conduct in 19 different cases, which included the 3 cases at issue in this appeal. Defendant asserted that the Livingston County State's Attorney told him that the State would "[i]ndite [*sic*] [him] 2 to 4 cases at a time" to subvert his right to a speedy trial.

¶ 10 In May 2009, defendant filed a supplemental petition for postconviction relief, reiterating his previous two contentions and adding a third claim that his 97-year aggregate

sentence, which was comprised of the consecutive sentences imposed in case Nos. 03-CF-60, 03-CF-61, 03-CF-62, as well as several other convictions, violated the constitutional prohibition against cruel and unusual punishments. In support of his claim, defendant noted his depression and obsession with a prison psychiatrist as evidence of his compromised mental stability.

¶ 11 In October 2009, the State filed a motion to dismiss defendant's amended and supplemental petitions. Following a November 2009 second-stage hearing, the trial court took the matter under advisement. In January 2010, the court entered an order, granting the State's motion because defendant failed to allege a substantial violation of a constitutional right.

¶ 12 This appeal followed.

¶ 13 II. THE TRIAL COURT'S SECOND-STAGE DISMISSAL OF DEFENDANT'S AMENDED AND SUPPLEMENTAL POSTCONVICTION PETITIONS

¶ 14 A. Proceedings Under the Act

¶ 15 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 to 122-7 (West 2010); *People v. Gomez*, 409 Ill. App. 3d 335, 338, 947 N.E.2d 343, 346-47 (2011). "At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit.' " (Emphasis in original.) *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010) (quoting *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005)).

"Section 122-2.1 [of the Act] directs that if the defendant is sentenced to imprisonment (rather than death) and the circuit court determines that the petition is frivolous or patently without merit, it shall be dismissed in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004)." *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 99-100 (2008).

¶ 16 If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed (725 ILCS 5/122-4 (West 2010)). At the second stage, the State has the opportunity to answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2010)). The relevant question raised during a second-stage postconviction hearing is whether the allegations in the petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates a stage-three evidentiary hearing. *People v. Cheers*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009). A trial court's second-stage dismissal of a defendant's postconviction petition under the Act presents a question of law that we review *de novo*. *Chears*, 389 Ill. App. 3d at 1024, 907 N.E.2d at 44.

¶ 17 B. Defendant's Claim That His Postconviction Petition Alleged
a Substantial Showing of a Constitutional Violation

¶ 18 Defendant argues that the trial court erred by dismissing his amended and supplemental petitions for postconviction relief because he made a substantial showing that (1) his aggregate sentence in this and other unconsolidated cases violates the constitutional prohibition against cruel and unusual punishments, (2) the State subverted his constitutional rights to due process and a speedy trial by tactically delaying certain indictments, and (3) the DOC citations issued to defendant for his conduct did not provide sufficient notice that the same

conduct could expose him to criminal prosecution for aggravated battery. Because this court has previously addressed and rejected the identical arguments based on the same factual scenario defendant presents in this case, we disagree.

¶ 19 In *Gay*, 2011 IL App (4th) 100009, ¶¶ 19, 20, 960 N.E.2d at 1278, this court rejected defendant's characterization that his 97-year aggregated sentence was a *de facto* life sentence that amounted to cruel and unusual punishment. Defendant's aggregate sentence was comprised of consecutive sentences that were imposed as a result of his 16 felony convictions. In disposing of defendant's claim, we noted that "the relief available in postconviction proceedings is defined by and constrained to the proceedings identified in the petition." *Gay*, 2011 IL App (4th) 100009, ¶ 20, 960 N.E.2d at 1278. See *People v. Guerrero*, 2012 IL 112020, ¶ 14 ("Postconviction relief is limited to constitutional deprivations that occurred at the original trial"). Because defendant did not allege that his six-year extended term sentence for aggravated battery in Livingston County case No. 03-CF-172—the case defendant appealed—was grossly disproportionate to his conviction, we rejected defendant's argument as unpersuasive. *Gay*, 2011 IL App (4th) 100009, ¶ 20, 960 N.E.2d at 1278.

¶ 20 This court also rejected defendant's reliance on *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), the same decision defendant relies on in this case. *Gay*, 2011 IL App (4th) 100009, ¶ 26, 960 N.E.2d at 1279. Specifically, this court employed the two-part analysis outlined by the Supreme Court in *Graham* to determine whether a punishment imposed is categorically unconstitutional. *Id.* We concluded that (1) no national consensus existed against the sentencing practice at issue (*Gay*, 2011 IL App (4th) 100009, ¶ 27, 960 N.E.2d at 1280) and (2) the penological goals of retribution and incapacitation were satisfied by allowing the courts to

sentence mentally ill persons as severely as others (*Gay*, 2011 IL App (4th) 100009, ¶ 29, 960 N.E.2d at 1280).

¶ 21 This court further rejected defendant's argument that the State violated his speedy trial rights by engaging in preindictment delay to obtain a tactical advantage. *Gay*, 2011 IL App (4th) 100009, ¶ 32, 960 N.E.2d at 1280. We concluded that even if defendant's contention was true, "[d]efendant can demonstrate neither prejudice to him nor tactical advantage attaining to the State that resulted from the lapse of time between his commission of aggravated battery and his prosecution in [case No. 03-CF-172]." *Gay*, 2011 IL App (4th) 100009, ¶ 44, 960 N.E.2d at 1284. See *United States v. Marion*, 404 U.S. 307, 324, 92 S Ct. 455, 465 (1971) (a preindictment delay violates due process concerns when the delay (1) causes a defendant substantial prejudice and (2) "was an intentional device to gain a tactical advantage over the accused").

¶ 22 With regard to defendant's contention that the DOC citations issued to defendant for his conduct did not provide sufficient notice that the same conduct could expose him to criminal prosecution, we concluded that the criminal statute under which defendant was charged with aggravated battery was sufficient—in itself—to provide defendant the required notice. *Gay*, 2011 IL App (4th) 100009, ¶ 57, 960 N.E.2d at 1286. We noted that our conclusion was consistent with the enduring principle that " 'one's ignorance of the law furnishes no exemption from criminal responsibility for his acts.' " *Id.*, quoting *People v. Cohn*, 358 Ill. 326, 331, 193 N.E. 150, 153 (1934).

¶ 23 Accordingly, as we previously stated, defendant presents the identical arguments under the same factual scenario we considered and rejected in *Gay*. Although defendant

acknowledges this court's decision in *Gay*, he disagrees with our analysis. Defendant's disagreement notwithstanding, he has not presented us any reason why we should depart from our holdings in that case.

¶ 24

III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.