

NOTICE  
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2012 IL App (4th) 110122-U

Filed 4/11/12

NO. 4-11-0122

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ALFRED L. McBRIDE,	)	No. 92CF447
Defendant-Appellant.	)	
	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Justices McCullough and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because defendant did not allege sufficient facts showing that the over 13-year delay of his postconviction petition was not due to his culpable negligence, as required by section 122-1(c) of the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2006)), the appellate court affirmed the trial court's dismissal of defendant's postconviction petition on timeliness grounds.

¶ 2 Following a January 1993 trial, a jury convicted defendant, Alfred L. McBride, of first degree murder (720 ILCS 5/9-1(a) (West 1992)). The trial court later sentenced defendant to 45 years in prison.

¶ 3 In October 2007, defendant *pro se* filed a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2006)), which his appointed counsel later amended. Following a January 2011 second-stage hearing, the trial court dismissed defendant's amended postconviction petition, finding, in pertinent part, that the filing of his

initial postconviction petition was barred on timeliness grounds and the delay was not excused due to a lack of culpable negligence.

¶ 4 Defendant appeals, arguing that the trial court erred by dismissing his amended petition for postconviction relief on timeliness grounds. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Conviction and Appeal

¶ 7 On July 10, 1992, the State charged defendant with first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1992)). The following is a brief summary of the evidence presented at defendant's January 1993 jury trial.

¶ 8 On July 8, 1992, the victim, Anthony Adams, spent the day with his two cousins, eating dinner at their home, playing basketball, and visiting friends. As Adams and his cousins walked back to Adams' home that evening, two cars pulled up, and someone in the backseat of one of the cars asked them whether they had seen his little brother. They responded that they had not. Defendant then exited the car he was in and ran at the trio with a gun. His cousins ran away but Adams hesitated. When Adams ran, several witnesses testified that defendant shot Adams in the back of his head. A nearby deputy sheriff on routine patrol heard the gunshots that were fired in rapid succession and arrived at the scene within seconds. The deputy found defendant and the gun used to shoot Adams near defendant's car. Adams later died at the hospital.

¶ 9 After a jury convicted defendant of first degree murder, the trial court later sentenced him to 45 years in prison. Defendant appealed, and this court affirmed defendant's conviction and sentence. *People v. McBride*, No. 4-93-0210 (May 9, 1994) (unpublished order under Supreme Court Rule 23).

¶ 10

B. Defendant's Amended Postconviction Petition  
and the Trial Court's Dismissal

¶ 11

In October 2007, defendant *pro se* filed a postconviction petition, essentially questioning the motives of the witnesses that testified against him and claiming that the evidence presented at his January 1993 trial was insufficient to prove him guilty beyond a reasonable doubt. Accompanying his postconviction petition was a motion for appointment of counsel, which the trial court later granted. In November 2007, the State filed a motion to dismiss defendant's postconviction petition, arguing, in pertinent part, that his postconviction petition was barred because defendant failed to file it within six months after this court addressed his appeal, as required by section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2006)).

¶ 12

In June 2010, defendant filed a response to the State's motion to dismiss and an amended petition for postconviction relief. In his response, defendant conceded that his postconviction petition was untimely but nonetheless urged the trial court to consider it because the delay was not caused by his own culpable negligence. In support of his response, defendant appended an affidavit to his pleading, which stated, in pertinent part, the following:

"3. On October 9, 2007, I filed a Petition for Post-Conviction Relief, along with supplemental filings in regard to same.

4. Issues have been raised in that Petition for Post-Conviction Relief which I was unable to bring prior to this due to no negligence of my own.

5. I have been incarcerated at the Big Muddy River Correctional Center.

6. During that time period of this first petition, this correctional facility was on lockdown for large periods of time in which I would be required to stay in my cell and I was not provided reasonable access to written materials or the law library.

7. Also during that same period of time, due to the lockdown and also budgetary concerns, I only had limited access to the law library. Moreover, the materials provided in the law library were not up to date, nor was I provided an attorney to help me during that time period.

8. In addition, I suffer from both short-term and long-term memory loss, which has affected my capacity to properly respond in this matter."

¶ 13 In his amended postconviction petition, defendant alleged ineffective assistance of trial counsel in that his counsel (1) prevented him from presenting evidence that the eyewitnesses who testified against him did not like his mother and (2) failed to call defense experts to testify about "gun residue testing or ballistics testing."

¶ 14 In November 2010, the State filed a memorandum in support of its motion to dismiss defendant's petition for postconviction relief and amended petition for postconviction relief. Following a January 2011 second-stage hearing, the trial court entered a written order, stating, in part, as follows:

"Initially, the Court notes that [defendant's] *Pro Se* Petition for Post-Conviction Relief was filed more than 13 years after the

Appellate Court mandate issued. Therefore, it should be dismissed as untimely, under section 122-1(c) of the \*\*\* Act, unless [defendant] shows that he was not culpably negligent in his late filing. Defendant \*\*\* argues that the prison to which he is confined was on lockdown during this 13-year period between the issuance of the Appellate Court mandate and the filing of the *Pro Se* Petition. However, he has not provided specific dates the prison was on lockdown, and the Court cannot find, absent proof to the contrary, that the institution was on lockdown each day for 13 consecutive years. Defendant \*\*\* also asserts that he suffers from memory loss and that this was another reason for the delay in filing his *Pro Se* Petition. The Court cannot find that the asserted memory loss can excuse such a lengthy delay. Therefore, the Court does not find that [defendant's] late filing is excused by a lack of culpable negligence as required by [s]ection 122-1(c). The *Pro Se* Petition is untimely and shall be dismissed."

¶ 15 This appeal followed.

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

¶ 17 Defendant argues that the trial court erred by dismissing his amended petition for postconviction relief on timeliness grounds. Essentially, defendant contends that because he alleged sufficient facts showing that the 13-year delay in filing his postconviction petition was

not due to his culpable negligence, he was entitled to an evidentiary hearing. We disagree.

¶ 18                   A. Proceedings Under the Act and the Standard of Review

¶ 19                   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 2006). Section 122-1(c) of the Act mandates that no postconviction proceeding "shall be commenced more than [six] months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his \*\*\* culpable negligence." 725 ILCS 5/122-1(c) (West 2006). Culpable negligence is comprised of something greater than ordinary negligence and is comparable to recklessness. *People v. Lander*, 215 Ill. 2d 577, 587, 831 N.E.2d 596, 601-02 (2005).

¶ 20                   In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 through 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).

¶ 21 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). If the petition alleges a substantial showing of a constitutional deprivation, the petition proceeds to a stage-three evidentiary hearing. *Phyfiher*, 361 Ill. App. 3d at 883, 838 N.E.2d at 184. 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.

¶ 22 B. Defendant's Claim That the Trial Court Erred by Dismissing His Amended Postconviction Petition As Untimely

¶ 23 We first note that in his brief to this court, defendant relies on the First District's decision in *People v. Wheeler*, 392 Ill. App. 3d 303, 310, 912 N.E.2d 681, 688 (2009), to support his contention that because he alleged sufficient facts showing that the more than 13-year delay in filing his postconviction petition was not due to his culpable negligence, he was entitled to an evidentiary hearing. However, we conclude that *Wheeler* does not offer defendant any support.

¶ 24 1. *The Appellate Court's Decision in Wheeler*

¶ 25 In *Wheeler*, 392 Ill. App. 3d at 304, 912 N.E.2d at 683, the defendant *pro se* filed a petition for leave to file a late petition for postconviction relief. In support of his petition, the

defendant appended an affidavit explaining that the four-month delay was caused by (1) five prison transfers over the three-year period, which limited his access to his trial materials and the prison's law library and (2) his eight-month confinement in isolation for prison rule violations. *Wheeler*, 392 Ill. App. 3d at 304-05, 912 N.E.2d at 683. The defendant's appointed counsel later filed a supplemental postconviction petition, alleging that the court failed to admonish him that he would be required to serve a three-year mandatory-supervised-release (MSR) term following his imprisonment. *Wheeler*, 392 Ill. App. 3d at 305, 912 N.E.2d at 684.

¶ 26 The State moved to dismiss the defendant's postconviction petition, arguing that although the trial court did not admonish the defendant about the applicable MSR term, the defendant's petition was barred on timeliness grounds because he failed to file it within three years of his conviction. *Wheeler*, 392 Ill. App. 3d at 305, 912 N.E.2d at 684. See 725 ILCS 5/122-1(c) (West 2006) ("If a defendant does not file a direct appeal, the post[ ]conviction petition shall be filed no later than [three] years from the date of conviction"). The State also argued that the defendant's delay in filing his petition was not excusable under section 122-1(c) of the Act. *Id.*

¶ 27 The defendant filed a reply to the State's motion to dismiss, appending a second affidavit in which he explained further that his petition was delayed because (1) the prison facility was on general lockdown for significant periods, which precluded access to the law library and notaries and (2) the circuit clerk failed to respond to his request for transcripts of his guilty plea hearing. *Id.* Following a second-stage hearing, the trial court denied the State's motion to dismiss and granted the defendant's postconviction petition without holding a third-stage evidentiary hearing.

¶ 28 On appeal, the State argued that (1) the "defendant was culpably negligent in filing his postconviction petition four months late" and (2) "the trial court erred by granting postconviction relief without first holding an evidentiary hearing." *Wheeler*, 392 Ill. App. 3d at 306, 912 N.E.2d at 685. The appellate court, which declined to reach the merits of the State's first argument, vacated the court's decision and remanded with instructions that the court conduct a third-stage evidentiary hearing because the court's order "prevented the State from fulfilling its statutory obligation of filing an answer, with a premature grant of relief ." *Wheeler*, 392 Ill. App. 3d at 310, 912 N.E.2d at 688. The appellate court held that if the Act contemplated granting relief at the second stage, the General Assembly would not have mandated that the State file an answer following a denial of a second-stage motion to dismiss. *Wheeler*, 392 Ill. App. 3d at 310, 912 N.E.2d at 688. See 725 ILCS 5/122-5 (West 2006) ("In the event that a motion to dismiss is filed and denied, the State must file an answer within 20 days after such denial").

¶ 29 In support of its conclusion, the First District stated, as follows:

"[W]hen a trial court determines whether or not a defendant was culpably negligent, the trial court must assess the defendant's credibility. [Citation.] Such an assessment is not intended for a second-stage dismissal hearing, where a trial court is foreclosed from fact-finding [*sic*] and all well-pleaded facts are taken as true. [Citation.] Assessments of credibility are better suited to a third-stage evidentiary hearing, which does not occur until after the State's answer, which never occurred in this case." *Wheeler*, 392 Ill. App. 3d at 310, 912 N.E.2d at 688.

¶ 30 Defendant relies on the aforementioned quote from *Wheeler* for the proposition that because his claims regarding the reasons for the untimely filing of his initial petition were un rebutted by the record, the trial court was bound to accept those claims as true, which he asserts entitles him to a third-stage evidentiary hearing. We reject defendant's interpretation because the First District's comments did not address the court's determination at the second-stage proceeding. Indeed, the appellate court expressly declined to review the court's second-stage decision. Instead, the appellate court's comments were made in the context of addressing whether the court was statutorily required to hold a third-stage evidentiary hearing before granting a defendant's postconviction petition—a hearing in which the State can still challenge the veracity of the defendant's timeliness claims, which obviously contemplates making credibility determinations. See *Wheeler*, 392 Ill. App. 3d at 310, 912 N.E.2d at 688 (rejecting the defendant's claim that the evidence presented at a third-stage evidentiary hearing is limited to the underlying constitutional claim).

¶ 31 Simply put, the third-stage evidentiary hearing question addressed in *Wheeler* is not before us. Instead, our analysis concerns whether the trial court erred by granting the State's motion to dismiss defendant's postconviction petition on timeliness grounds at the second-stage. In other words, the question before us is whether defendant's postconviction petition sufficiently alleged—based *solely* on the record, the petition, and any appended affidavits—that the more than 13-year delay in filing his postconviction petition was not due to his culpable negligence, which would preclude the court's dismissal. We conclude that defendant did not meet this burden.

¶ 32 *2. Defendant's Claim That He Was Not Culpably Negligent*

¶ 33 As we have previously noted, defendant contends that because his claims regarding the reasons for the untimely filing of his initial petition were un rebutted by the record, the court was bound to accept those claims as true, which he claims entitles him to a third-stage evidentiary hearing.

¶ 34 "If a postconviction petition is not filed within the limitations period, the Act requires the petitioner to allege facts showing the delay was not due to his or her culpable negligence." *People v. Perkins*, 229 Ill. 2d 34, 43, 890 N.E.2d 398, 403 (2007). In the absence of allegations substantiating a lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion. *Id.*

¶ 35 We reject defendant's contentions that merely alleging that (1) a prison was in lockdown "for large periods of time," (2) his memory is unreliable, or (3) the prison law library was inadequate—absent more—are well-pleaded facts sufficient to show that defendant was not culpably negligent in filing his postconviction petition more than 13 years after the statutory deadline. Indeed, we view defendant's claims as mere conclusory statements. To conclude otherwise and permit defendant's petition to proceed to a third-stage evidentiary hearing on such scant grounds would subject the courts to a deluge of postconviction litigation undoubtedly based on similarly scant claims that would unnecessarily waste scarce judicial resources. See *Wheeler*, 392 Ill. App. 3d at 308, 912 N.E.2d at 686 (postconviction timeliness claims are considered only after counsel has been appointed).

¶ 36 Moreover, if we were to accept defendant's claim, such a determination would essentially eviscerate the timeliness constraints created by section 122-1(c) of the Act. Here, defendant's 13 years of inaction evinces an indifference to the consequences of his incarceration

that establishes his culpable negligence, which precludes the consideration of his untimely postconviction petition.

¶ 37

### III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.