

No. 1-11-1041

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. 96 CR 15758
)	
ANTWAUN CUBIE,)	Honorable
)	Noreen Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 **Held:** Where defendant failed to allege facts demonstrating a lack of culpable negligence in the untimely filing of his postconviction petition, the circuit court's dismissal of that petition during the second stage of postconviction proceedings is affirmed.
- ¶ 2 Defendant Antwaun Cubie appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition as being untimely filed. On appeal, defendant contends the circuit court erred in dismissing his petition because it sufficiently alleged facts demonstrating he was not culpably negligent for the untimely filing. Defendant also contends the

circuit court should have held an evidentiary hearing to determine the credibility of his claim that he was not culpably negligent for the untimely filing. We affirm.

¶ 3 Following a 1999 jury trial, defendant was convicted of first degree murder and armed robbery for shooting his high school friend, Jeremy Bruder, seven times. The trial court found defendant eligible for the death penalty, but sentenced him to natural life in prison for the murder and a concurrent term of 30 years' imprisonment for the armed robbery.

¶ 4 On direct appeal, defendant argued that his trial counsel rendered ineffective assistance because he failed to file a pretrial motion to suppress defendant's inculpatory statement, failed to file a motion to quash arrest and suppress evidence, and presented an insanity defense with an expert witness who was unfamiliar with the standard for insanity in Illinois. This court rejected defendant's claims and affirmed his convictions and sentences. *People v. Cubie*, No. 1-99-2283 (2001) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal on June 6, 2001. *People v. Cubie*, 195 Ill. 2d 559 (2001).

¶ 5 On November 29, 2001, defendant filed a petition for writ of *habeas corpus* in the United States District Court for the Northern District of Illinois raising the same claims of ineffective assistance of trial counsel that he raised before this court on direct appeal. The district court denied defendant's petition on July 29, 2002. *United States ex rel. Cubie v. Walls*, No. 01 C 9167 (2002) (unpublished order). The United States Supreme Court denied defendant's petition for writ of *certiorari* on May 19, 2003. *Cubie v. Walls*, 538 U.S. 1039 (2003).

¶ 6 On August 10, 2003, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2002). Defendant alleged that his trial counsel rendered ineffective assistance because he failed to request a bifurcated hearing prior to trial to resolve the issue of insanity, and instead, presented inconsistent "dual defenses" of insanity and reasonable doubt. Defendant stated that he exercised due diligence in raising this

issue after receiving newly discovered evidence. Defendant attached to his petition an affidavit dated July 29, 2003, from Dr. Douglas Foster, who testified at trial as the defense's expert witness regarding insanity. Dr. Foster stated that counsel said he would not decide whether the doctor needed to testify until the State presented its case. Dr. Foster further stated that counsel did not provide him with defendant's detailed history, which the doctor had requested. In a memorandum in support of his petition, defendant asserted that Dr. Foster's affidavit was newly discovered evidence, and that neither defendant nor appellate counsel knew that trial counsel had planned to use a dual defense in the weeks preceding trial. The circuit court appointed counsel to represent defendant and advanced his petition to second-stage proceedings under the Act.

¶ 7 On December 12, 2003, the State filed a motion to dismiss defendant's postconviction petition arguing that it was untimely filed. The State further argued that defendant failed to present a proper claim for newly discovered evidence, and instead, merely alleged another claim of ineffective assistance of trial counsel, which was waived because it could have been raised on direct appeal. Alternatively, the State argued that defendant's claim was without merit because a bifurcated hearing was not required.

¶ 8 In July 2008, private counsel filed his appearance in this case, and the public defender withdrew. On August 7, 2009, defendant filed an amended postconviction petition alleging he had newly discovered evidence that established his actual innocence, and that trial counsel rendered ineffective assistance. Defendant stated that Rukiya Banks-Thomas provided an affidavit stating she was talking on the telephone with defendant on the night of the murder and heard gunshots in the background, and they were then disconnected. Defendant argued that this evidence supported a theory that the gunman was codefendant Kevin Jackson, not defendant. Defendant further stated that Robert Walker provided an affidavit stating that codefendant Jackson told Walker in prison that defendant was not with Jackson on the night of the murder.

Defendant also stated that Oak Park police officer Harris, who testified Bruder made a dying declaration naming defendant as the gunman, was fired in 1999 for lying on police reports.

Defendant claimed it was logical to conclude Officer Harris lied about the dying declaration.

¶ 9 In addition, defendant alleged that trial counsel rendered ineffective assistance because he failed to investigate claims that defendant was abused by the Oak Park police. He argued that affidavits from his mother, Darlene Cubie, his aunt, E. Michele Cubie, and Cedric McLaughlin showed that when they visited defendant at the police station, he was bent over and grimacing in pain. Defendant asserted that trial counsel was informed of these observations, but did nothing. Defendant also claimed counsel was ineffective because he failed to investigate whether Bruder would have been able to speak after being shot, failed to present a coherent insanity defense, and presented conflicting defenses. Defendant stated that there were several documents and affidavits that would support his claims, but he was unable to obtain them due to his indigence, restrictions on police personnel records, and the deadline for his amended petition. Defendant did not claim a lack of culpable negligence for the untimely filing of his petition, but instead, stated that because his petition was based on newly discovered evidence, it was not barred by the time limitation in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2002)).

¶ 10 Defendant attached multiple documents to his amended petition including Banks-Thomas' affidavit dated August 5, 2009, Walker's affidavit dated April 2, 2008, McLaughlin's affidavit dated April 26, 2001, Darlene Cubie's affidavit dated June 19, 2001, E. Michele Cubie's affidavit dated March 26, 2001, Dr. Foster's affidavit from defendant's initial petition, undated newspaper articles about Officer Harris, and Bruder's ambulance report. On December 4, 2009, defendant submitted a report from Arnell Brady, a speech language pathologist, indicating that he reviewed Bruder's ambulance and autopsy reports and concluded it would not have been possible for Bruder to speak after being shot.

¶ 11 On February 5, 2010, the State moved to dismiss defendant's amended postconviction petition arguing it was untimely filed, and should be dismissed on that basis alone. It noted that when defendant filed his *pro se* petition in August 2003, the Act provided that a postconviction petition had to be filed within six months following the denial of a petition for leave to appeal, or three years from the date of conviction, whichever was sooner, unless defendant alleged facts showing the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2002). The State pointed out that there was no exception to the timeliness provision for claims of actual innocence at that time, and that the statute was later amended effective November 19, 2003, to eliminate timeliness concerns for claims of actual innocence. The State asserted that the deadline for defendant to file his *pro se* postconviction petition was December 6, 2001, and he did not demonstrate that he was not culpably negligent for the untimely filing. The State further argued that defendant failed to plead a proper claim of actual innocence because his claim was not free-standing and the evidence was not new or of such conclusive character that it would change the result of his trial. In addition, the State argued that defendant's claims of ineffective assistance of trial counsel were procedurally barred by the doctrines of *res judicata* and waiver, and otherwise without merit.

¶ 12 On April 2, 2010, defendant filed a supplement to his amended postconviction petition stating that he recently received an affidavit from Anthony Ray Ferguson, who was detained at the Oak Park police department in an unrelated case on the same night defendant was arrested. Ferguson's affidavit stated that he saw defendant being taken into a separate room, heard screaming and scuffling coming from that room, and the next day defendant appeared to be beaten. Ferguson gave defendant his contact information, but was never contacted. Defendant said he gave Ferguson's information to trial counsel, but counsel failed to contact Ferguson. Defendant also asserted that he told appellate counsel about the abuse and trial counsel's failure

to contact several witnesses, but appellate counsel told defendant to "stick to playing basketball" and not to question his work.

¶ 13 In addition, defendant stated that there was no evidence that he was responsible for the delay in raising his claims. Defendant said he told both his trial and appellate counsel about the various witnesses, but they ignored him. Defendant attached three of his own affidavits to his supplement. In his first affidavit, dated March 14, 2001, defendant stated that he told trial counsel that Ferguson saw him being abused and gave counsel Ferguson's contact information, but counsel never contacted Ferguson. Defendant also stated that he asked counsel to hire a medical expert to prove Bruder would have been unable to speak, and a private investigator to speak with possible witnesses, but counsel did nothing. In his second affidavit, dated March 19, 2010, defendant stated that he made numerous attempts since 2001 to locate Cedric McLaughlin regarding his affidavit, but had limited resources available to him because he was incarcerated. Defendant further stated that he attempted to contact Banks-Thomas after his arrest, and trial counsel refused to contact her. Defendant maintained that trial counsel neglected his case, and stated that counsel had since been disbarred. In his third affidavit, dated March 22, 2010, defendant averred that he told appellate counsel that he was abused and told him about the various witnesses, but counsel told him that he did not like to be questioned as an attorney.

¶ 14 On July 2, 2010, the State filed an amended motion to dismiss defendant's amended postconviction petition and supplement, maintaining its arguments that defendant's petition was untimely filed, failed to plead a proper claim of actual innocence, and his claims of ineffective assistance of counsel were procedurally barred and without merit. The State noted that the affidavits from defendant's mother, his aunt, McLaughlin and one of defendant's own affidavits were all notarized in 2001, before the deadline for defendant to file his *pro se* petition, and defendant did not explain why he delayed submitting them until 2009, eight years later.

¶ 15 In his response to the State's motion to dismiss, defendant maintained that the affidavits constituted newly discovered evidence of his actual innocence which required an evidentiary hearing. Defendant also argued that the factual allegations in the affidavits showed that he was not culpably negligent for the delayed filing. He argued that he filed his petition *pro se* and attempted to locate witnesses from prison. He further argued that trial counsel ignored his requests to locate other witnesses, and appellate counsel ignored his evidence of actual innocence. In addition, defendant asserted that his claims of ineffective assistance of counsel raised new issues, and therefore, were not barred by *res judicata* and waiver.

¶ 16 On November 5, 2010, the trial court denied the State's motion to dismiss and advanced defendant's postconviction petition for an evidentiary hearing on his allegation that trial counsel rendered ineffective assistance for failing to call five witnesses. The State filed a motion to reconsider arguing that the circuit court did not address the State's timeliness argument, and that defendant failed to show he was not culpably negligent for the untimely filing, requiring his petition to be dismissed. The court acknowledged that it did not address the timeliness issue when it granted the evidentiary hearing and agreed it should reconsider the State's argument.

¶ 17 The court found that defendant filed his *pro se* petition 20 months after the deadline and did not allege any facts that showed his lack of culpable negligence for the untimely filing. The court stated that it compared the version of the Act that was in effect when defendant filed his petition with the amended Act, and pointed out that the provision which states that claims of actual innocence are not barred by a statute of limitations was not available when defendant filed his *pro se* petition. Regardless, the court found that defendant did not establish a claim of actual innocence that would excuse the untimely filing because he did not provide information that was new, nor did he provide facts that would exonerate him. Based on these findings, the court

concluded that defendant's postconviction petition was untimely filed, and granted the State's motion for reconsideration and motion to dismiss defendant's petition.

¶ 18 On appeal, defendant concedes that he filed his petition 20 months late, but contends the circuit court erred in dismissing his petition because the affidavits demonstrated that he was not culpably negligent for the untimely filing. Defendant maintains that the affidavits show he had difficulty locating his witnesses from prison, and that both his trial and appellate counsel ignored his issues and his requests to locate witnesses. Defendant also contends the circuit court should have held an evidentiary hearing to determine the credibility of his claim that he was not culpably negligent for the untimely filing. Defendant asserts that at such hearing, he could have testified to the details of his imprisonment, such as dates the prison was on lockdown which prevented him from accessing the law library and individuals outside the prison.

¶ 19 The State contends the dismissal of defendant's petition was proper because defendant failed to allege any facts showing that the delay in filing was not due to his culpable negligence. The State argues that defendant merely asserts he should be excused from supporting his petition because he is incarcerated. The State notes that some of defendant's affidavits were notarized in 2001, before his petition was due, but submitted eight years later. The State further argues that defendant's claims of ineffective assistance of trial counsel should have been raised on direct appeal, and his claim against appellate counsel could have been raised in a timely petition.

¶ 20 We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Any claims that could have been raised on direct appeal, but were not, are forfeited, and claims that were addressed on direct

appeal are barred by *res judicata*. *Harris*, 224 Ill. 2d at 124-25. Defendant must demonstrate that he suffered a substantial deprivation of a constitutional right in the proceeding that produced his conviction or sentence in order to be entitled to postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

¶ 21 Postconviction proceedings must be initiated within the time limitations specified in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2002)), unless defendant alleges facts showing that the delay in filing his petition was not due to his culpable negligence. *People v. Lander*, 215 Ill. 2d 577, 586 (2005). Where defendant does not allege a lack of culpable negligence, the Act directs the circuit court to grant the State's motion to dismiss the petition as untimely during the second stage of postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007). Our supreme court defined "culpable negligence" as conduct greater than ordinary negligence and akin to recklessness. *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). The statute of limitations for filing a postconviction petition is the one in effect on the date the petition is filed. *Harris*, 224 Ill. 2d at 125, n.1. It is solely defendant's obligation to know the time limitations for filing his postconviction petition, and his ignorance of the law or his legal rights will not excuse a delay in filing. *Lander*, 215 Ill. 2d at 588-89. Each case must be determined based upon its own specific facts. *Lander*, 215 Ill. 2d at 589. The circuit court's factual findings as to whether or not defendant was culpably negligent for the delay in filing his petition will be disturbed only where such findings are manifestly erroneous. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009). However, the circuit court's ultimate conclusion as to whether those facts demonstrated culpable negligence is reviewed *de novo*. *Gerow*, 388 Ill. App. 3d at 527.

¶ 22 Here, we find the circuit court did not err when it dismissed defendant's postconviction petition as untimely. As the circuit court correctly noted, when defendant filed his *pro se* petition in August 2003, the Act provided, in relevant part, that a postconviction petition had to be filed

within six months following the denial of a petition for leave to appeal, unless defendant alleged facts showing the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2002). The statute was later amended effective November 19, 2003, to eliminate timeliness concerns for claims of actual innocence. See Pub. Act 93-605, § 15 (eff. Nov. 19, 2003) (amending 725 ILCS 5/122-1(c) (West 2002)). As stated earlier, the applicable statute of limitations is the one in effect at the time the petition is filed. Defendant does not argue that the amendment applies to him, nor does he advance a claim of actual innocence in this appeal. It is undisputed defendant's petition was filed 20 months late. Therefore, defendant was required to allege facts in his petition demonstrating that his delay in filing was not due to his culpable negligence.

¶ 23 After a thorough review of all of defendant's pleadings, we find that defendant did not allege any facts to show that his untimely filing was not due to his culpable negligence. In his *pro se* postconviction petition, his *pro se* memorandum in support of his petition, his amended postconviction petition, and his motion to supplement his amended petition defendant alleged that he was presenting newly discovered evidence of actual innocence, and therefore, his claims were not barred by statutory time limitations. Defendant was incorrect. The State raised the affirmative defense of untimeliness in its motion to dismiss defendant's *pro se* petition, its motion to dismiss defendant's amended petition, and in its amended motion to dismiss defendant's amended petition. Consequently, defendant was required to demonstrate his lack of culpable negligence for the untimely filing.

¶ 24 In his response to the State's motions to dismiss, defendant argued that the factual allegations in the affidavits attached to his amended petition showed that he was not culpably negligent for the delayed filing. Defendant argued then, as he does now on appeal, that he filed his petition *pro se*, he made several attempts to locate witnesses from prison, and his trial and

appellate counsel ignored his requests. Defendant's explanation is insufficient to excuse his delayed filing. Relief under the Act is available only to persons "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2002). The vast majority of postconviction petitions are filed by *pro se* petitioners who are incarcerated. It was defendant's responsibility to know the deadline for filing his postconviction petition, and his status as an imprisoned *pro se* petitioner does not excuse his delay in filing. Furthermore, defendant's ambiguous excuse that he made several attempts to locate witnesses from prison is insufficient without additional factual support or verification. *Gerow*, 388 Ill. App. 3d at 531.

¶ 25 As noted by the State, four of the affidavits relating to defendant's claim that he was abused by the Oak Park police were notarized in March, April and June 2001, six months before his postconviction petition was due. These affidavits were from defendant's mother, his aunt, Cedric McLaughlin, and defendant's own affidavit. The fact that defendant could not contact McLaughlin since 2001 does not excuse his late filing. McLaughlin's affidavit is dated April 26, 2001 – more than seven months prior to defendant's deadline to file his petition. Defendant submitted these affidavits with his amended petition in August 2009, with no explanation as to why he did not submit them eight years earlier in a timely filed petition. Similarly, the fact that defendant could not contact Rukiya Banks-Thomas after his arrest in June 1996 does not explain why he could not file a timely postconviction petition.

¶ 26 Moreover, defendant's only claims against his trial and appellate counsel are that they provided ineffective assistance by ignoring information he provided them. These claims should have been raised in a timely postconviction petition. Defendant's direct appeal was decided by this court on January 26, 2001. Our supreme court denied his petition for leave to appeal on June 6, 2001. The fact that trial counsel ignored information defendant gave him prior to trial, which was held in 1999, does not explain why defendant could not file a postconviction petition raising

the issue of counsel's effectiveness by December 6, 2001. Furthermore, appellate counsel filed his appellate brief on direct appeal with this court on August 18, 2000. Any claimed inaction by trial and appellate counsel occurred well over a year before defendant's deadline to file his postconviction petition, allowing defendant sufficient time to file a timely petition.

¶ 27 In addition, the written report from speech-language pathologist Arnell Brady did not demonstrate a lack of culpable negligence for defendant's untimely filing. Contrary to the representations in defendant's appellate brief, this report is not an affidavit, and Brady is not a medical doctor. According to Brady's report, he was retained by postconviction counsel in 2009 to review the medical examiner's report and the ambulance report. Based on his reading of these two reports, Brady opined that Jeremy Bruder would not have been able to speak due to his injury. However, at trial, Dr. Edmund Donoghue, a licensed medical doctor and chief medical examiner for Cook County, testified that Bruder would have been able to speak despite his injury. It appears postconviction counsel obtained this report to support defendant's claim of ineffective assistance of trial counsel for failing to call a medical expert to testify that Bruder would have been incapable of making a dying declaration naming defendant as the shooter. Defendant never claimed that his postconviction petition was delayed due to difficulty in obtaining an affidavit from a medical expert. Thus, Brady's report has no relevance to the issue of defendant's lack of culpable negligence for filing an untimely petition.

¶ 28 Finally, we reject defendant's argument that the circuit court should have held an evidentiary hearing to determine the credibility of his claim that he was not culpably negligent for the late filing. Defendant argues that an evidentiary hearing would have allowed him to testify about the details of his imprisonment, including the dates the prison was on lockdown, which he claims prevented him from accessing the law library and individuals outside the prison. These factual details should have been alleged in defendant's postconviction petition in response

to the State's affirmative defense of untimeliness. Here, defendant never alleged any facts to demonstrate that his untimely filing was not due to his culpable negligence. As discussed above, an ambiguous claim that defendant was hindered in his filing due to his incarceration is not sufficient to advance past the second stage of postconviction proceedings. If that was all that was required, every conclusory claim of lack of culpable negligence would advance for a third stage evidentiary hearing. Where, as here, defendant does not allege facts that demonstrate a lack of culpable negligence, the Act directs the circuit court to grant the State's motion to dismiss the petition as untimely during the second stage of postconviction proceedings. *Perkins*, 229 Ill. 2d at 43.

¶ 29 As an aside, we note that in his appellate and reply briefs, defendant asserts that both he and the State requested that the circuit court hold an evidentiary hearing to determine defendant's credibility regarding his factual assertions before concluding that he was culpably negligent for the untimely filing of his petition. Our review of the record reveals that this assertion is not correct and that postconviction counsel has taken a statement from the State's motion to reconsider the granting of an evidentiary hearing out of context. The State's motion states:

"Petitioner's failure to allege sufficient facts to support his claim that he is not culpably negligent requires that the petition be dismissed. *If the Court determines that he has raised facts to support his claim*, the Court must hold a hearing to determine whether his claims are credible.

WHEREFORE, the People request that the Court *reconsider its decision to grant an evidentiary hearing* and, instead, grant the People's motion to dismiss. *In the alternative*, the People request the Court to conduct an evidentiary hearing to determine the credibility of petitioner's claim that he lacks culpable negligence in filing an untimely petition." (Emphasis added.) (Common Law R. at 316.)

Thus, the State argued that an evidentiary hearing should not be held, unless the circuit court found that defendant had presented sufficient facts to demonstrate that he was not culpably negligent for the late filing. Here, the court found that defendant did not allege any facts that showed a lack of culpable negligence. This finding was correct.

¶ 30 We find it significant to point out that about the same time his postconviction petition was due on December 6, 2001, defendant was actively pursuing his claim of ineffective assistance of trial counsel in the federal court. Defendant filed his petition for writ of *habeas corpus* in federal court on November 29, 2001. The United States Supreme Court denied defendant's petition for writ of *certiorari* on May 19, 2003. It was three months after that denial that defendant filed his *pro se* postconviction petition in the circuit court. Accordingly, we find that the record shows that defendant's incarceration did not prevent him from pursuing legal action, but instead, that defendant chose to pursue his action in federal court and waited for those proceedings to end before filing his postconviction petition.

¶ 31 For these reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition as being untimely filed.

¶ 32 Affirmed.