

2013 IL App (1st) 112371-U

FIFTH DIVISION
June 7, 2013

No. 1-11-2371

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. 71 C 1267
)	
EUGENE HORTON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in dismissing defendant's *pro se habeas corpus* petition where the record on appeal was incomplete, and he failed to raise any claim that is subject to review in a *habeas corpus* proceeding.
- ¶ 2 Defendant Eugene Horton appeals *pro se* from the circuit court's dismissal of his *pro se* petition for *habeas corpus* relief. On appeal, defendant contends that this court should reverse the circuit court's dismissal of his petition where he established a reasonable doubt of his guilt and presented newly discovered evidence of his actual innocence. Defendant also contends that

the circuit court abused its discretion by failing to recharacterize the petition as a post-conviction petition. We affirm.

¶ 3 On March 21, 1971, Terry Tomalak, a social worker, was beaten and stabbed to death in the apartment of Jacqueline Mack. Defendant and his two codefendants, Felton Peck and defendant's brother George Horton, were charged with the murder of Tomalak. Peck was tried separately and convicted.

¶ 4 The evidence at the Hortons' jury trial showed that defendant, George, and Patsy Taylor came to visit Mack the evening of March 21, 1971. Later, Tomalak and Peck joined the group. Mack testified that Tomalak and Peck began to argue, and someone hit Tomalak, who fell into Mack's bedroom. Defendant and his codefendants followed Tomalak into the bedroom and all three beat him with bottles. Mack attempted to call the police, but was restrained by Peck. Defendant and his codefendants continued to beat Tomalak until he was crying and pleading for his life. Mack then saw Tomalak running toward the front door and being stabbed in the back by Peck. When Tomalak fell to the floor, Mack saw defendant pick up the knife. Mack ran into her bedroom and heard the struggle continue. When she looked out of the bedroom door, she saw Tomalak lying on the floor. Patsy Taylor corroborated Mack's testimony, and testified that she saw Tomalak in the bedroom with defendant and his codefendants while Tomalak's head was covered in blood.

¶ 5 Defendant testified that he was present in the apartment, but denied having assaulted Tomalak. Instead, he testified that he watched the fight between Peck and Tomalak, and saw George break up the fight. When he left the apartment, Tomalak was alive.

¶ 6 Defendant and George were found guilty and each was sentenced to a term of 100 to 150 years' imprisonment.

¶ 7 In their consolidated direct appeal, neither defendant nor his brother George challenged the sufficiency of the evidence. Instead, they asserted various prosecution errors, and alleged that the trial court erred in admitting certain evidence, their privilege against self-incrimination was violated, and certain hearsay statements were improperly allowed into evidence. They also claimed error in the withholding from them of certain grand jury minutes and finally contended that the sentences were excessive. In affirming defendant and George's convictions, the court stated there was evidence that the Hortons were accountable for the actions of Peck, and that the State presented overwhelming evidence of guilt. *People v. Horton*, 14 Ill. App. 3d 957, 961-62 (1973).

¶ 8 Defendant has since filed, *pro se*, various petitions for post-conviction relief, DNA testing, relief from judgment, *habeas corpus*, and *mandamus*. Each was dismissed or denied by the circuit court, and this court affirmed those judgments. See *People v. Horton*, 47 Ill. App. 3d 915 (1977); see also *People v. Horton*, Nos. 1-86-2483 (1988); 1-00-3874 (2001); 1-01-1866 (2002); 1-01-3814 (2002); 1-02-2132 (2003); 1-04-0097 (2005) (unpublished orders under Supreme Court Rule 23).

¶ 9 The instant appeal involves defendant's alleged filing of a *pro se* petition for *habeas corpus* relief on June 29, 2011, and the court's alleged dismissal order of July 7, 2011.

¶ 10 Defendant has failed to file any record in this appeal. Accordingly, we do not have either his purported petition or the court's dismissal order. It is well-established that it is the burden of the appellant to present a complete record and any doubts arising from an incomplete record must be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 392-94 (1984). Absent any record, this court has nothing to review.

¶ 11 Nevertheless, defendant filed a notice of appeal stating that the court denied his *habeas corpus* petition on July 7, 2011. Defendant further states in his reply brief that the record for this

appeal is attached to his opening brief. In particular, the appendix to his brief includes documents labeled "Petition" and "Request Award of Emergency Relief by Habeas Corpus." Neither document contains a file stamp. In defendant's "Petition," he stated that newly discovered evidence showed that he was actually innocent, the witnesses who testified against him were drunk at the time of the incident, and that a sober witness, who attested that defendant was not involved in the crime, confessed to the murder. Defendant also alleged that the evidence was insufficient to convict him where the DNA evidence was unreliable. An affidavit from his codefendant brother George is also attached to the brief, asserting that defendant did not participate in the crime. Furthermore, transcripts from a hearing on June 21, 2011 are attached, showing that the circuit court dismissed one of defendant's section 2-1401 petitions, which is the subject of a separate appeal (No. 1-11-2370). This court, however, need not consider these documents as they were not filed as part of the common law record following the filing of a notice of appeal. *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42-43 (2005).

¶ 12 Even if we were to consider these documents, defendant cannot obtain the requested relief under section 10-124 of the Code of Civil Procedure (Code) (735 ILCS 5/10-124 (West 2010)). *Habeas corpus* provides relief only on the grounds specified in section 10-124 of the Code. 735 ILCS 5/10-124 (2010); *Barney v. Prisoner Review Board*, 184 Ill. 2d 428, 430 (1998). A writ of *habeas corpus* is available only to obtain the release of a prisoner who has been incarcerated under a judgment of a court which lacked jurisdiction of the subject matter or the person of the petitioner, or where there has been some occurrence subsequent to the prisoner's conviction which entitled him to release. *Barney*, 184 Ill. 2d at 430. It may not be used to review proceedings that do not exhibit these defects, even though the alleged error may involve a denial of constitutional rights. *Barney*, 184 Ill. 2d at 430.

¶ 13 Here, according to the *habeas* petition defendant attached to his brief, he claimed there was a reasonable doubt of his guilt and that he was actually innocent of the murder based on his brother's affidavit. In his brief, defendant also maintains that he is entitled to relief because there was a change in Illinois sentencing laws regarding indeterminate sentencing, and a change in the way various statutes are reviewed. Defendant did not raise any error that is subject to review in a *habeas corpus* proceeding because he neither questioned the jurisdiction of the court to enter the judgment, nor set forth any post-conviction event that would entitle him to release. 735 ILCS 5/10-124 (West 2010) (listing causes for discharge from custody); *Barney*, 184 Ill. 2d at 430. Accordingly, defendant's petition was subject to denial. *Barney*, 184 Ill. 2d at 431.

¶ 14 Defendant also argues in his brief that the circuit court abused its discretion by failing to recharacterize his *pro se* petition as a post-conviction petition. Defendant's argument is without merit because a trial court has no obligation to recharacterize a *pro se* pleading (see *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1 (2005)), and a court's decision not to recharacterize a defendant's *pro se* pleading cannot be reviewed for error (see *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010)). See also *People v. Holliday*, 369 Ill. App. 3d 678, 682 (2007) (rejecting the defendant's argument that fundamental fairness required that his *habeas corpus* petition should have been recharacterized as a post-conviction petition); *People v. Luczak*, 374 Ill. App. 3d 172, 186 (2007) (upholding the trial court's decision to dismiss a meritless *habeas corpus* petition rather than recharacterize it as a post-conviction petition).

¶ 15 For the foregoing reasons, we affirm the July 7, 2011, order denying defendant's *habeas corpus* petition.

¶ 16 Affirmed.