

FIFTH DIVISION
AUGUST 1, 2014

No. 1-12-2743

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. 02 CR 17658
)	
ROBERT PASCHAL,)	The Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed over defendant's contention that the firearm sentencing enhancement statute was unconstitutionally vague on its face.

¶ 2 Defendant Robert Paschal appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) by the circuit court of Cook County. He solely contends that the firearm sentencing enhancement

statute is unconstitutionally vague on its face, and, accordingly, that this court should strike the 25-year add-on to his sentence and remand the cause for resentencing.

¶ 3 This court previously affirmed defendant's 2004 jury conviction for first degree murder and sentence of 25 years' imprisonment, plus a 25-year add-on firearm enhancement. *People v. Paschal*, No. 1-04-2378 (2007) (unpublished order under Supreme Court Rule 23). In June 2010, defendant filed a *pro se* postconviction petition alleging, in relevant part, that the firearm sentencing enhancement statute was unconstitutional. The court failed to rule on this petition within 90 days, and, accordingly, counsel was appointed to represent him and filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. Counsel stated therein that she had consulted with defendant by mail and phone to ascertain his contentions of deprivations of constitutional rights, obtained and read the report of proceedings at trial and sentencing, and did not prepare a supplemental petition for postconviction relief because defendant's *pro se* petition adequately sets forth his claims.

¶ 4 In May 2012, the State filed a motion to dismiss defendant's postconviction petition, alleging, in relevant part, that defendant's claims were barred by waiver and otherwise unsupported. After a hearing on August 1, 2012, the circuit court granted the State's motion to dismiss defendant's postconviction petition. In doing so, the court noted that defendant's petition had advanced to the second stage because the file was initially lost, and substantively, that defendant had not presented "sufficient matter" to entitle him to third-stage proceedings.

¶ 5 On appeal, defendant solely contends that the 25 years-to-life firearm sentencing enhancement statute is unconstitutionally vague. He maintains that it encourages arbitrary and discriminatory imposition of sentences, and offers no criteria to guide trial courts in imposing sentences within the broad sentencing range.

¶ 6 The State initially responds that defendant is barred from bringing this claim in a postconviction petition because it could have been raised on direct appeal. Although defendant could have raised this claim on direct appeal, the constitutionality of a statute can be raised at any time. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 11.

¶ 7 As to the substantive matter, we observe that a defendant is not entitled to a third-stage evidentiary hearing unless the allegations set forth in his petition, as supported by the trial record or affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). In making that determination, all well-pleaded facts in the petition and affidavits are to be taken as true; however, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the Act. *Rissley*, 206 Ill. 2d at 412. On appeal, we review *de novo* the circuit court's decision to dismiss defendant's postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 8 Under section 5-4.5-20 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-20(a) (West 2012)), the sentencing range for first degree murder is 20 to 60 years' imprisonment. However, in those cases where defendant personally discharged a firearm that proximately caused the death of another during the commission of the offense the trial court must add a term of 25 years or up to a term of natural life to the sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012).

¶ 9 In *People v. Butler*, 2013 IL App (1st) 120923, ¶¶ 42-43, *pet. for leave to appeal denied*, No. 116420 (Sept. 25, 2013), this court found that the firearm sentencing enhancement statute was constitutional, against virtually the same vagueness challenge to the statute raised by defendant in this case. Defendant acknowledges that decision, but requests this court to reject

Butler, noting this court's observation that "confusion could be avoided if the legislature provided more explicit guidance regarding the imposition of the 25-years-to-life sentence enhancement." *Butler*, 2013 IL App (1st) 120923, ¶ 42. This argument, however, overlooks this court's determination that the "scope and standards of the 25-years-to-life sentence enhancement are not vague," but rather, are clearly defined in the sentencing enhancement statute, and must be applied when defendant commits first degree murder and discharges a firearm proximately causing great bodily harm, permanent disability, permanent disfigurement, or death. *Butler*, 2013 IL App (1st) 120923, ¶ 41; accord *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 120-21.

¶ 10 We find the reasoning in the above-cited decisions persuasive, and likewise conclude that the 25 years-to-life firearm enhancement is not unconstitutionally vague; and, therefore, that the trial court did not err in dismissing defendant's postconviction petition at the second stage of proceedings where he failed to make a substantial showing of a constitutional violation.

¶ 11 Affirmed.