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2014 IL App (3d) 120895-U

Order filed November 13, 2014
Modified Upon Denial of Rehearing December 18, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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| THE PEOPLE OF THE STATE, OF ILLINOIS |) | Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-12-0895 Consolidated with 3-13-0004 Circuit No. 97-CF-5 |
| STEVE THOMPSON, |) | |
| Defendant-Appellant. |) | The Honorable Charles H. Stengel, Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's post conviction petition was untimely because it came prior to his sentence being vacated and he failed to then properly file a post conviction petition upon resentencing. The trial court also did not abuse its discretion by resentencing the defendant to 52 years imprisonment because the matters in aggravation and mitigation were properly considered.

¶ 2 On July 10, 1997, after a three day jury trial, Steve Thompson, the defendant, was found guilty of first degree murder and aggravated battery for striking 16 month old Chardae Williams

about the head and body and/or violently shaking her, causing her death, and committing those acts and knowingly causing her great bodily harm when he was older than 18 and she was younger than 13. Though the State sought the death penalty under the statute at that time, the jury did not find the defendant eligible for a sentence of death. The court then sentenced the defendant to natural life imprisonment on the charge of first degree murder pursuant to requirements at the time. His motion for a new trial was denied.

¶ 3 The defendant appealed, and this court issued a Rule 23 order vacating his un-sentenced conviction of aggravated battery of a child on one-act-one-crime grounds but affirming his conviction of and sentence for first degree murder in its January 22, 1999, order and February 19, 1999, mandate. The defendant's argument of ineffective assistance of counsel for failing to object to the admission of evidence concerning a preexisting bite mark and contusion injuries found during Chardae's autopsy was also rejected because the evidence "show[ed] a pattern of abuse [by defendant] against [victim] that eventually culminated in his shaking her to death."

¶ 4 On September 18, 2006, defendant filed a *pro se* petition for post conviction relief raising numerous issues. He also filed a *pro se* motion for independent evidence testing to prove he did not bite Chardae and alleging that his trial counsel had suborned perjury in requiring him to testify to the contrary. On November 5, 2006, counsel was appointed to represent the defendant in his post conviction proceedings.

¶ 5 After more than two years, dozens of continuances secured by the defendant's appointed post conviction counsel, and two separate hearings at which the defendant's motions for new counsel were denied, the defendant filed a *pro se* motion arguing that his natural life sentence was void and he should be resentenced. At a status hearing held on November 23, 2009, defense counsel argued persistently that the defendant should be resentenced prior to the hearing on his

post conviction petition. However, the trial judge agreed with prosecution that the post conviction hearing should take place first.

¶ 6 On March 2, 2010, counsel filed a motion to vacate the defendant's life sentence, arguing that it was void, and he should be resentenced, based on *People v. Wooters*, 188 Ill. 2d 500 (1999). At a status hearing held on March 17, 2010, the parties again argued about the timing of the post conviction hearing, and the judge again ruled it should be conducted before any new sentencing hearing.

¶ 7 On June 1, 2010, defense counsel filed an amended petition for post conviction relief, a Rule 651(c) certificate and a motion for independent testing requesting that a forensic odontologist be appointed to show that Sonia Williams, Chardae's mother, bit Chardae.

¶ 8 On February 1, 2011, counsel filed a second amended post conviction petition. The State filed its motion to dismiss the new post conviction petition on June 6, 2011, and defense counsel filed its written response on May 3, 2012. Following a hearing, the court dismissed the petition as untimely and also ruled, alternatively, that the petition had no merit. The court also granted defendant's motion to vacate his natural life sentence.

¶ 9 A new sentencing hearing was held on September 28, 2012. At the hearing, the trial court held the following:

"THE COURT: Well, in looking at the presentence investigation report and considering the facts of the case and considering the testimony that the Court heard today, it's clear in the factors in aggravation that he does have a prior history of criminal activity. He was on felony Class 2 probation at the time that this offense occurred.

He claims that he has no gang activity, and there has been no evidence that he's involved in a gang.

It's clear that his prison record – he's been a good prisoner, based upon the infractions.

But children can't protect themselves, especially children this young *** one of the factors to consider is to deter others from committing the same crime *** to make sure that people who commit crimes like this are sentenced and *** don't get breaks.

Factors in mitigation: He does have potential for rehabilitation. He has completed the two programs

I believe, in looking at all the factors in mitigation and the factors in aggravation, that the fair and just sentence in this case is 52 years in the Illinois Department of Corrections, to be followed by three years' mandatory supervised release, and that's going to be the sentence and judgment of this Court."

¶ 10 After his motion to reconsider was denied, the defendant filed a timely notice of appeal. In a decision issued November 12, 2014, this court affirmed the trial court's denial of his post conviction petition and affirmed his sentence of 52 years imprisonment and three years of mandatory supervised release.

¶ 11 The defendant has filed a petition for rehearing requesting an expansion in the court's statement regarding statutorily ascribed time limitations for filing a post conviction petition. Rehearing is denied, but we made the slight modification to the order that was requested.

¶ 12 ANALYSIS

¶ 13 Both parties agree that in order for the defendant's post conviction petition to be timely for raising claims other than actual innocence, it must have been filed within six months after this court issued its mandate. 725 ILCS 5/122-1(c) (West 2008). It was not. Yet, citing *People v. Hager*, 202 Ill. 2d 143 (2002), the defendant argues the trial court should not have granted the State's motion to dismiss his second amended post conviction petition because his petition was timely for his later resentencing. He contends that once his sentence was vacated and he was resentenced, the time for him to file a post conviction petition began to run anew. Thus, his previously filed post conviction petition was timely. The State argues that not only did the defendant file his post conviction petition several years past the statutorily allowed six month filing period but that in order for the trial court to have made its ruling on the defendant's post conviction petition there must have been a conviction in place. The subsequent vacating of his sentence in the same order dismissing his untimely post conviction petition only gave the defendant the opportunity to file a new and then timely post conviction petition. We agree.

¶ 14 Challenges to proceedings from a conviction can be brought prior to a later vacating of the judgment of the proceedings. See *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011) (noting how the defendant could and did challenge proceedings from his conviction prior to the order vacating the judgment). In this case, the defendant has presented no case law affirming that such challenges need not conform to statutory requirements. Thus the defendant's sentence

given in 1997 and affirmed by this court's 1999 mandate was still in place during the pendency of his untimely-filed post conviction petition in 2006.

¶ 15 Further, the defendant's reliance upon *Hager* to salvage his untimely post conviction petition is misguided. In *Hager*, the supreme court reiterated that "as used in the Post Conviction Hearing Act, the word 'conviction' is a term of art which means a final judgment that includes both a conviction *and* a sentence." (Emphasis in original.) *Hager*, 202 Ill. 2d at 149 (quoting *People v. Woods*, 193 Ill. 2d 483, 488 (2000)). The day a sentence is vacated, the defendant no longer stands convicted. *Id.*

¶ 16 The trial court granted the State's motion to dismiss the defendant's post conviction petition in the same order it vacated his sentence. Consequently, the defendant no longer had a conviction which his post conviction petition could challenge. That same petition cannot be a challenge to his later granted resentence because the resentencing had yet to occur at the time the defendant filed his petition. *Id.* ("a defendant who is not 'convicted' cannot file a post-conviction petition"); see also *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011). His untimely 2006 post conviction petition does not carry over.

¶ 17 Upon resentencing on September 28, 2012, the defendant's time to file a post conviction petition began anew. See *Hager*, 202 Ill. 2d at 149-50. The defendant has "6 months after the conclusion of proceedings in the United States Supreme Court" or if he elects not to file a petition of certiorari "6 months from the date for filing a certiorari petition" to file a timely post conviction petition unless in either instance he can "allege facts showing that the delay was not due to his culpable negligence," 725 ILCS 5/122-1(c) (West 2012). "This limitation does not apply to a petition advancing a claim of actual innocence." *Id.*

¶ 18 For these procedural failings of the defendant's post conviction petition, we affirm the trial court's dismissal of his post conviction claims based on untimeliness. We purposefully do not reach the issue of the reliability of bite mark analysis or shaken baby syndrome evidence so as not to foreclose what appears to be a claim of actual innocence raised inartfully during his post-conviction petition hearing and in this appeal.

¶ 19 The defendant next argues that his 52-year sentence issued after his resentencing hearing was excessive and an abuse of the judge's discretion. The State contends that the matters in aggravation and mitigation of the sentence were properly considered. We agree.

¶ 20 Though this court has the power to reduce a sentence, this power is only exercised " 'cautiously and sparingly' " when discretionary abuse is evident. *People v. Alexander* 239 Ill. 2d 205, 212 (2010) (quoting *People v. Jones*, 168 Ill. 2d 367, 378 (1995)). The trial court's judgment regarding sentencing is afforded great deference because the fact-finders are in a better position to observe the defendant for "credibility, demeanor, general moral character *** ", where the reviewing court has only the record to rely upon. *Alexander*, 239 Ill. 2d at 212-13. However, this discretion is qualified and a reviewing court is authorized under Illinois Supreme Court Rule 615(b)(4) (eff.) to reduce a sentence where abuse is shown. *People v. Streit*, 142 Ill.2d 13, 19 (1991); *Alexander*, 239 Ill.2d at 212. Abuse of this qualified discretion exists where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Alexander*, 239 Ill. 2d at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 21 In the present case, we do not find that the sentence imposed greatly varied from the spirit and purpose of the law. Nor was it manifestly disproportionate to the nature of the offense. The defendant's first degree murder conviction carries a mandatory sentencing range from 20 to

60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2007). In considering an appropriate sentence, the trial court evaluated the facts of the case as well as the testimony presented during the hearing and determined that a term of 52 years imprisonment with 3 years mandatory probation was warranted. Although the trial court is not required to list and assign weight to each of the statutory factors in mitigation because it is presumed the trial court considered all mitigating evidence (see *People v. Holman*, 2014 IL App (3d) 120905, ¶ 73 (citing *People v. Meeks*, 81 Ill. 2d. 524, 534 (1980)), the order in the instant case listed and balanced the mitigating factors presented by the defendant as well as those that were aggravating. The evidence included testimony from the defendant's family members, his presentencing report, his prior criminal record, and his prison record for the past 15 years. The trial court also discussed the impact and purpose of law and punishment when dealing with crimes involving "children that can't protect themselves," and how sentences work to rehabilitate an inmate and deter future like crimes.

¶ 22 The defendant would have us speculate on the likelihood of spontaneous rage and his possible mental state at the time of Chardae's death. He also asks us to reweigh the evidence and give greater weight to the mitigating evidence than the trial court gave it. We are unable to engage in such a reevaluation. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). The defendant fails to identify any impropriety in the trial court's sentencing analysis. Although the sentence is lengthy, we do not find that the trial court abused its discretion.

¶ 23 The defendant's appeal is denied because his original and second amended post conviction petitions were untimely. His sentence of 52 years imprisonment and 3 years of mandatory supervised release is affirmed.

¶ 24 Affirmed.