

**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).

2014 IL App (4th) 120828-U

NO. 4-12-0828

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

February 14, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

|                                      |   |                  |
|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from      |
| Plaintiff-Appellee,                  | ) | Circuit Court of |
| v.                                   | ) | McLean County    |
| DENNIS SCOTT McMILLIAN,              | ) | No. 08CF995      |
| Defendant-Appellant                  | ) |                  |
|                                      | ) | Honorable        |
|                                      | ) | Scott Drazewski, |
|                                      | ) | Judge Presiding. |

PRESIDING JUSTICE APPLETON delivered the judgment of the court.  
Justices Pope and Steigmann in the judgment.

**ORDER**

¶ 1 *Held:* In the second stage of the postconviction proceeding, the petition failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant, Dennis Scott McMillian, is serving a sentence of 53 years' imprisonment for first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). He filed, *pro se*, a petition for postconviction relief, which the trial court dismissed on the State's motion. He appeals.

¶ 3 The office of the State Appellate Defender (OSAD) has moved to withdraw from representing defendant because OSAD does not believe that any reasonable argument could be made in support of this appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. Lee*, 251 Ill. App. 3d 63 (1993). We notified defendant of his right to file additional points and authorities by a certain date, but he has not done so. After carefully reviewing the petition and

the record, we agree with OSAD's assessment of the merits of this appeal. Therefore we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 4

## I. BACKGROUND

¶ 5

### A. The Charges

¶ 6

On August 29, 2008, the State filed an information charging defendant with first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)) in that on August 29, 2008, he stabbed Angela Neal to death.

¶ 7

On September 10, 2008, the information was superseded by an indictment, which, in addition to charging defendant with the first degree murder of "Angel [*sic*] Neal (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)), charged him with aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)) in that on August 28, 2008, he inflicted a knife wound on A.T. (Victim impact statements refer to the victim as "Angel Neal," as do other court documents.)

¶ 8

### B. The Arraignment

¶ 9

On September 12, 2008, defendant appeared with an assistant public defender, Ronald Lewis, and the trial court held an arraignment. The court stated:

"Cause is coming on initially this morning for an Arraignment. Mr. McMillan [*sic*], I am handing to you and your attorney each a copy of a 7 count Bill of Indictment that has been returned by the Grand Jury of McLean County. That Indictment alleges in Counts 1 through 7 that you committed the offense of first degree murder; and in Count 7 aggravated battery. Counts 1, 2 and 3 are each alleged to be Class X Felonies that have as a maximum penalty the possibility of the imposition of the death

penalty or natural life in prison. Counts 4, 5 and 6 each carry a possible maximum penalty of natural life in prison. Do you understand these possible penalties, sir?

MR. LEWIS: We acknowledge receipt, waive formal reading and enter a plea of not guilty on each and every count."

¶ 10 C. The Subsequent Guilty Plea

¶ 11 In a hearing on July 16, 2009, defendant entered a blind plea of guilty to count III of the indictment, which alleged he had committed first degree murder by stabbing Neal while knowing that he thereby created a strong probability of great bodily harm to her. See 720 ILCS 5/9-1(a)(2) (West 2008). Count III alleged that, under section 9-1(b)(19) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)(19) (West 2008)), death was an authorized penalty for this offense because, at the time defendant murdered her, Neal was the subject of an order of protection issued against defendant in McLean County case No. 08-OP-118.

¶ 12 D. The Sentence

¶ 13 The trial court held a sentencing hearing on September 17, 2009. The State recommended natural life imprisonment because defendant murdered Neal while the order of protection was in effect and, alternatively, because the crime was exceptionally brutal and heinous. Also, the State argued that an extended prison term of 100 years was warranted because defendant committed the murder while he was on probation for domestic battery, the victim of which was Neal.

¶ 14 The trial court found that the State had proved beyond a reasonable doubt that Neal was the subject of an order of protection against defendant at the time he murdered her.

After remarking that this circumstance made him eligible for an extended term sentence, the court sentenced him to imprisonment for 53 years.

¶ 15 On October 16, 2009, defendant filed a motion to reduce the sentence. In a hearing on January 26, 2010, the trial court denied the motion. The court noted it had imposed neither a sentence of natural life imprisonment nor an extended term sentence.

¶ 16 E. The Direct Appeal

¶ 17 Defendant took a direct appeal. On June 1, 2011, we affirmed the conviction and sentence, finding no error in the guilty-plea proceeding and no abuse of discretion in the sentence. *People v. McMillan*, No. 4-10-0153 (June 1, 2011) (unpublished order under Supreme Court Rule 23). (In the record, defendant's last name sometimes is spelled as "McMillan" and sometimes is spelled as "McMillian." We note, however, that in his *pro se* filings, defendant spells his last name as "McMillian.")

¶ 18 F. Postconviction Proceedings

¶ 19 On February 18, 2011, defendant filed, *pro se*, a petition for postconviction relief. The petition is difficult to understand in places, but defendant appears to be making six claims: (1) the prosecutors deliberately misled the grand jury; (2) he never was indicted of first degree murder; (3) he never was arraigned; (4) he was illegally and unconstitutionally sentenced to life imprisonment; (5) the murder statute under which he was convicted, section 9-1 of the Criminal Code of 1961 (720 ILCS 5/9-1 (West 2008)), violates the *ex post facto* clauses of the federal constitution (U.S. Const., art. I, § 9) and the Illinois Constitution (Ill. Const. 1970, art. I, § 16); and (6) the supreme court has invalidated Public Act 89-428 on the ground that it violates the single-subject clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)), and therefore section 9-1, which Public Act 89-428 "adopted," likewise violates the single-subject clause.

¶ 20 The trial court did not summarily dismiss the petition within 90 days. See 725 ILCS 5/122-2.1(a) (West 2010). Therefore, on August 8, 2011, the court appointed postconviction counsel, Brian McEldowney. See 725 ILCS 5/122-2.1(b), 122-4 (West 2010).

¶ 21 On December 9, 2011, McEldowney filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). According to the certificate, he had "personally consulted with the Defendant regarding this petition"; he had reviewed the transcripts of the "plea proceedings" and the sentencing hearing; he had reviewed our decision on direct appeal; he had "examined the trial court file"; and he had "elected to make no modifications to the motion." No amended petition was filed.

¶ 22 On January 6, 2012, the State filed a motion to dismiss the petition for four reasons. First, as a matter of record, defendant was not sentenced to life imprisonment; rather, he was sentenced to imprisonment for 53 years. Second, section 9-1 was constitutional on August 29, 2008, when the charges were originally filed. Third, defendant could have raised all his claims earlier; therefore, *res judicata* and procedural forfeiture barred them. Fourth, he has failed to make a substantial showing of a constitutional violation.

¶ 23 On August 27, 2012, the trial court granted the State's motion for dismissal, finding that the petition failed to make a substantial showing of a constitutional violation. Specifically, the court found that (1) section 9-1 was constitutional; (2) defendant was sentenced to 53 years' imprisonment, not natural life imprisonment—even though he was eligible for natural life imprisonment; and (3) the record showed he was arraigned on September 12, 2008.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Alleged Deception Toward the Grand Jury

¶ 27 In our *de novo* review of the second-stage dismissal, we ask whether defendant made a substantial showing of a constitutional violation. See *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 16. "Nonspecific and nonfactual assertions that merely amount to conclusions" are not a substantial showing of a constitutional violation. *Id.* In his petition, defendant alleges that "[t]he prosecutors intentionally and deliberately, 'upon oath,' mislead [*sic*] the grand jury." This is a nonspecific and nonfactual assertion amounting merely to a conclusion. Defendant fails to specify in what way the prosecutors deliberately misled the grand jury, let alone provide any evidence they did so. See 725 ILCS 5/122-2 (West 2010) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.").

¶ 28 B. The Alleged Lack of an Indictment

¶ 29 The petition alleges that defendant "was [not] indicted with a[n] indictment of 1st degree murder, before the conviction." We do not accept allegations that the record contradicts. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). The record contradicts this allegation. The common-law record contains an indictment, and one of the counts of this indictment is count III, to which defendant pleaded guilty. Count III is signed by the jury foreman, Douglas L. Kelsey, and it charges defendant with the first degree murder of "Angel Neal" (720 ILCS 5/9-1(a)(2) (West 2008)).

¶ 30 C. The Alleged Failure To Arraign Defendant

¶ 31 The petition alleges: "Mr. McMillian was not arr[a]igned \*\*\*." This is another allegation that the record flatly contradicts. See *Coleman*, 183 Ill. 2d at 381-82. "Before any person is tried for the commission of an offense he shall be called into open court, informed of the charge against him, and called upon to plead thereto." 725 ILCS 5/113-1 (West 2008). The

trial court did those things on September 12, 2008. "If the defendant so requests the formal charge shall be read to him before he is required to plead." *Id.* Rather than request a reading of the charges, defendant's attorney, Lewis, waived a reading of them.

¶ 32 D. The Supposed Illegal Sentence of Natural Life Imprisonment

¶ 33 The petition alleges that defendant "was sentenced to natural life of imprisonment, illegally and unconstitutionally." We do not even reach the qualifiers "illegally and unconstitutionally" because the record belies the allegation that the trial court sentenced defendant to natural life imprisonment. See *Coleman*, 183 Ill. 2d at 381-82. Instead, the court sentenced him to imprisonment for 53 years, a statutorily authorized sentence (730 ILCS 5/5-8-1(a)(1)(a) (West 2008) ("[F]or first degree murder, \*\*\* a term shall be not less than 20 years and not more than 60 years \*\*\*.")).

¶ 34 E. The Purported *Ex Post Facto* Violation

¶ 35 The petition alleges: "The supreme court ruled in [*People v. Shumpert*, 126 Ill. 2d 344 (1989), that] the statute 9-1, mandated by Public Act 84-1450, violated the ex post facto clause of the state and federal constitution."

¶ 36 Actually, that was not the ruling of the supreme court in *Shumpert*. As the supreme court discussed in that case, Public Act 84-1450 replaced murder with first degree murder and replaced voluntary manslaughter with second degree murder (Ill. Rev. Stat. 1987, ch. 38, pars. 9-1(a), 9-2(a). *Shumpert*, 126 Ill. 2d at 348. The supreme court held that a single section of Public Act 84-1450, section 13, violated the state and federal constitutional prohibitions against *ex post facto* laws. *Id.* at 353. Section 13 provided that Public Act 84-1450 would be applied retroactively to January 1, 1987. *Id.* The supreme court held that such retroactive application violated *ex post facto* principles. *Id.* The supreme court added, however:

"As section 13 is severable from the remainder of the Act [citation], the remainder of the Act may stand." *Id.* Public Act 84-1450 was to be "applied prospectively from its effective date" (*id.*), which the supreme court determined to be July 1, 1987 (*id.* at 355). The offense of first degree murder is part of the remainder of Public Act 84-1450—which stood (*id.*).

¶ 37 F. The Invalidity of Public Act 89-428

¶ 38 The petition observes that in *Johnson v. Edgar*, 176 Ill. 2d 499, 518 (1997), the supreme court held that Public Act 89–428 was enacted in violation of the single subject clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)) and that the act therefore was invalid. True, but that holding is irrelevant to defendant's case. With respect to section 9-1, all Public Act 89-428 did was add some language to subsection (b)(6)(c) (720 ILCS 5/9-1(b)(6)(c) (West 1996)), a subsection inapplicable to defendant, delineating an aggravating factor that has nothing to do with him. "The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment." *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). When one subtracts the amendment to subsection (b)(6)(c), subsection (a)(2) (720 ILCS 5/9-1(a)(2) (West 2008)) still provides: "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death \*\*\* he knows that such acts create a strong probability of \*\*\* great bodily harm to that individual \*\*\*."

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the trial court's judgment, and we grant OSAD's motion to withdraw.

¶ 41 Affirmed.