2015 IL App (1st) 123486-U

THIRD DIVISION
February 11, 2015

No. 1-12-3486

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. 04 CR 18879
	)	
TYLER MARKS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's amended postconviction petition was properly dismissed when he could not show that its untimely filing was not due to his culpable negligence.

¶ 2 Defendant Tyler Marks appeals from the order of the circuit court granting the State's motion to dismiss his amended petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). On appeal, Marks contends that the circuit court erred when it granted the State's motion to dismiss because he made a substantial showing that the late filing of his petition was not due to his culpable negligence. Marks further contends that

his due process rights were violated when, during his guilty plea, the court failed to admonish him regarding the three-year term of mandatory supervised release (MSR) he must serve upon his release from prison. We affirm.

¶ 3 Marks' arrest and prosecution arose out of a July 2004 incident during which he fired a gun and wounded Calvin Jenkins, Anna Brown, and Timothy Greenlee. He was later charged by indictment with, among other offenses, three counts of attempted murder.

¶ 4 The matter was set for a bench trial on February 8, 2006. However, on that day, Marks threw himself on the "mercy" of the court and asked for less than a 14-year prison term. The court responded that the parties had previously engaged in a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), during which the State offered 20 years and the court had offered 18 years. The court indicated that it was willing to "come down" to 16 years. Marks accepted. The court then explained, *inter alia*, that Marks was pleading guilty to three Class X offenses, that the applicable sentencing range for each offense was between 6 and 30 years in prison, and that Marks would have to serve 85% of the sentence. After explaining the possible penalties, the court asked whether Marks still wished to enter a guilty plea and Marks answered in the affirmative. Marks was ultimately sentenced to three concurrent 16-year prison terms. Marks did not file a motion to withdraw his plea or a direct appeal.

¶ 5 In November 2006, Marks filed a *pro se* motion for discovery seeking a transcript of his sentencing hearing, which the circuit court denied. In November 2010, Marks filed a second unsuccessful *pro se* motion seeking the transcript.

¶ 6 In July 2011, Marks filed, *pro se*, an "Action for Declaratory Judgment." This pleading alleged that Marks was not advised at his sentencing hearing that he would be required to serve

85% of his sentence or that he was subject to a three-year term of MSR upon his release from prison. Marks did not obtain a copy of the transcript of his guilty plea hearing prior to filing this pleading.

¶ 7 In September 2011, the circuit court, with Marks' consent, recharacterized the *pro se* pleading as a postconviction petition, and appointed postconviction counsel. Postconviction counsel then filed an amended postconviction petition and a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The amended petition alleged that during sentencing the trial court did not admonish Marks that he would be required to serve a three-year term of MSR upon his release from prison. Attached to the amended petition was Marks' affidavit in which he averred that he was not informed that (i) he would be required to serve a three-year term of MSR upon his release from prison, (ii) he would not have entered a guilty plea had he known about the MSR term, and (iii) he learned about the MSR term when he transferred to a new prison in April 2009.

¶ 8 The State then filed a motion to dismiss, which the trial court granted in a written order. In the order, the court found that Marks' petition was untimely and that Marks did not explain why, after learning about the term of MSR in April 2009, he waited an additional two years to raise this issue.

¶ 9 On appeal, Marks first contends that his petition was dismissed in error because he was not culpably negligent in the untimely filing of his petition.

¶ 10 Marks' petition reached the second stage of proceedings where counsel is appointed to aid a defendant. At the second stage of proceedings under the Act, a defendant has the burden to make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458,

473 (2006). The "substantial showing" that must be made at this stage is a measure of the legal sufficiency of the defendant's well-pled allegations, which if proved at an evidentiary hearing, would entitle defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. All well-pled facts in the petition that are not positively rebutted by the trial record are to be taken as true. *Pendleton*, 223 Ill. 2d at 473. The dismissal of a postconviction petition at the second stage of the proceedings is reviewed *de novo*. See *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 Pursuant to section 122-1(c) of the Act, if a defendant does not file a direct appeal, he must file a postconviction petition "no later than 3 years from the date of conviction," unless he alleges facts showing that the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2010). If the three-year window for filing a postconviction petition has expired and the defendant does not allege facts that show the late filing is not due to his culpable negligence, the petition must be dismissed as untimely. *People v. Perkins*, 229 Ill. 2d 34, 43 (2008). Our supreme court has explained that "the 'culpably negligent' standard contained in section 122-1(c) contemplates something greater than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). It is a defendant's burden to file a timely postconviction petition (*People v. Lander*, 215 Ill. 2d 577, 588-89 (2005)), and, if the petition is untimely, it is the defendant's burden to establish a lack of culpable negligence (*People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008)).

¶ 12 Here, Marks was convicted on February 8, 2006, when he entered his plea of guilty and sentence was imposed. Thus, because Marks did not file either a motion to withdraw the plea or a direct appeal, the deadline for filing a postconviction petition was February 8, 2009. Marks did not commence this case until July 2011. Marks acknowledges that this case was filed outside of

the three-year window, but alleges that the late filing was not due to his culpable negligence because he did not learn of the basis for his claim until sometime after April 2009, more than three years after the he pled guilty. He notes that in November 2010 he attempted to obtain a transcript of the guilty plea hearing and that he filed this case roughly seven months later. Based on these facts, Marks argues that he has established a lack of culpable negligence.

¶ 13 But the three-year period for filing a postconviction claim in the instant case began with the date of conviction, not the date that defendant learned of his claim. See *People v. Davis*, 351 Ill. App. 3d 215, 217-18 (2004). Here, taking as true Marks' assertion that he did not learn about the MSR term until sometime after April 2009, he fails to explain the more than two-year delay in filing this case. Although Marks argues that he was thwarted in his attempts to obtain a copy of the relevant transcript, the State contends, and we agree, that this does not excuse the two-year delay between when he learned of his claim and the commencement of this case. Indeed, Marks filed this case without the benefit of a transcript, thus establishing that the lack of a transcript did not impede his ability to pursue relief.

¶ 14 In *People v. Diefenbaugh*, 40 Ill. 2d 73 (1968), the defendant argued that his petition, filed eight-and-a-half years after his sentence and three years after the five-year statutory deadline then in effect, was not late due to culpable negligence because any delay was caused by difficulties in obtaining trial transcripts. Our supreme court rejected this argument, concluding that if a defendant believes that a transcript is essential to the "proper presentation" of his claim, he has only to allege in his postconviction petition that he is unable to pay the cost of the proceeding and the court could order that he be permitted to proceed as a poor person. *Id.* at 75. In other words, a defendant's "mere allegation that he was unable to obtain a *** transcript does

not establish his freedom from culpable negligence in failing to file his petition within the required time designated" by the Act. *Id.*

¶ 15 Similarly, Marks contends that his attempts to obtain a transcript of the hearing during which he plead guilty and was sentenced were stymied by the court, and, consequently, he could not have filed a postconviction petition earlier. But at this stage of proceedings under the Act, Marks' assertion, supported by his affidavit, that he was not told of MSR at the time of sentencing must be taken as true, and, therefore, a transcript was not required to raise this claim. See *Pendleton*, 223 Ill. 2d at 473 (all well-pleaded facts in the petition that are not positively rebutted by the trial record are to be taken as true). In other words, even if Marks believed that the transcript was necessary to support his claim, he could have commenced a postconviction proceeding without it, as he ultimately did. His arguments on appeal that he was diligent in his attempts to obtain the transcript do not excuse the delay. See *Diefenbaugh*, 40 Ill. 2d at 75 (rejecting the defendant's argument that his "diligent" attempts to obtain a transcript in order to file a postconviction petition "justified" his failure to file the petition in a timely manner).

¶ 16 We also reject Marks' alternative argument that we should remand this cause for an evidentiary hearing because the circuit court's untimeliness determination was based on a credibility determination that should not have been made on the pleadings. See *People v. Wheeler*, 392 Ill. App. 3d 303, 310-11 (2009) (concluding that the credibility of a defendant's allegations of lack of culpable negligence should be assessed at an evidentiary hearing). Taking Marks' factual assertions as true as we must at this stage, thereby mooting any credibility questions, we conclude that he has failed to demonstrate that the delay in filing his petition was not due to his culpable negligence when his only explanation for the delay - his inability to

obtain a transcript of his guilty plea hearing - is one that our supreme court has rejected. See *Diefenbaugh,* 40 Ill. 2d at 75 (a defendant's "mere allegation" that he could not obtain a transcript does not establish a lack of culpable negligence).

¶ 17 Ultimately we conclude that the circuit court properly dismissed the amended postconviction petition because Marks was culpably negligent in failing to timely file his *pro se* postconviction petition. See *Perkins*, 229 Ill. 2d at 43. Given our disposition of this case on the basis of the untimely filing of the petition, we do not reach the merits of Marks' MSR claim. See *People v. Ramirez,* 361 Ill. App. 3d 450, 455 (2005).

¶ 18 Marks next requests corrections to his fines and fees order. Marks did not raise this issue in his postconviction petition. Generally, a defendant cannot raise an issue for the first time on appeal from the dismissal of a postconviction petition. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). But given that the State agrees with the corrections requested by Marks, we will consider them.

¶ 19 First, the parties agree that the $5 court system fee should be vacated because Marks was not convicted of a vehicular violation pursuant to Section 5/5-1101(a) of the Counties Code (see 55 ILCS 5/5-1101(a) (West 2004)). The parties also agree that the $200 DNA analysis fee should be vacated because Marks was assessed the fee in connection with a prior conviction (see *People v. Marshall*, 242 Ill. 2d 285, 303 (2011)). Therefore, we vacate the $5 court system fee and the $200 DNA analysis fee.

¶ 20 Marks also contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2004)), he is entitled to a $2,825 credit based on 565 days of presentence custody. Marks was assessed certain fines that may be

offset by the presentence custody credit: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2004)), the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2004)), and the $4 Criminal/Traffic Conviction Surcharge (730 ILCS 5/5-9-1(c-9) (West 2004)). Therefore, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, and the $4 Criminal/Traffic Conviction Surcharge fine be offset by Marks' presentence custody credit.

¶ 21 The parties finally agree that the Violent Crimes Victims Assistance Fund (VCVA) fine (see 725 ILCS 240/10 (West 2004)), should be reduced from $20 to $4 because Marks was already assessed $19 in fines. Pursuant to section 10(c) of the VCVA statute (725 ILCS 240/10(c) (West 2004)), a $20 fine is improper when another fine is imposed. Here, Marks' VCVA fine should be reduced to $4 because, as discussed above, Marks was already assessed $19 in other fines. See 725 ILCS 240/10(b) (West 2004).

¶ 22 The judgment of the circuit court of Cook County dismissing Marks' postconviction petition is affirmed. Pursuant Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order by (1) vacating the $5 court system fee and the $200 DNA analysis fee; (2) offsetting the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, and the $4 Criminal/Traffic Conviction Surcharge fine with Marks' presentence custody credit; and (3) reducing the $20 VCVA fine to $4, for a new total due of $289.

¶ 23 Affirmed; fines and fee order corrected.