

No. 1-13-2401

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. 05 C6 61313
)	
SPENCER WILLIAMS,)	Honorable
)	Anna Helen Demacopoulos,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Dismissal of defendant's second-stage postconviction petition affirmed; fines and fees order modified.
- ¶ 2 Defendant, Spencer Williams, appeals the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that his petition should be remanded for further proceedings because postconviction

counsel provided unreasonable assistance by failing to comply with Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. April 26, 2012). He also contends that the fines and fees order should be corrected.

¶ 3 The record shows that on May 21, 2007, defendant entered negotiated pleas of guilty to burglary charges in two separate cases (05C6-61313 and 05C6-61314). Pursuant to the agreement, the court sentenced defendant to concurrent terms of two years' probation, and assessed certain fines and fees. The record further shows that defendant's probation was terminated unsatisfactorily on January 9, 2009.

¶ 4 On May 3, 2012, defendant filed the postconviction petition at bar alleging, *inter alia*, that his counsel was ineffective for failing to request a fitness hearing before he entered his guilty plea in case number 05C6-61313. On July 5, 2012, the circuit court advanced the petition to the second stage of proceedings and appointed counsel to represent defendant. At a hearing on March 8, 2013, counsel indicated that he had not yet reviewed the trial transcript, but in his preliminary inquiries, he had corresponded with defendant who indicated that the filing of the postconviction petition was in error. Counsel stated that he needed to obtain the transcripts for the plea agreement and "file the 651-C before [he could] take any position on this matter." Counsel also informed the court that he had not yet received the transcripts he had ordered, and that he would have to speak with defendant to determine how to proceed. The parties agreed that defendant would be present for the next status date, and defense counsel indicated that would save him the need of "making a trip or the phone call."

¶ 5 The record reflects that defendant was present in court on April 19, 2013, when the court reviewed the procedural history of the case. Based on that history and the provisions of the Act, the State asserted that defendant had no standing to file a postconviction petition because he was not incarcerated on the underlying offense (05C6-61313 (burglary)) at the time he filed the petition. In response, defense counsel argued that because the petition was docketed and advanced to the second stage "the issue of timeliness should *** be waived at this time." The State replied that because defendant had no standing before the court, the petition was not properly before the court in order to proceed to a second-stage hearing.

¶ 6 The court noted that defendant was sentenced to probation in 05C6-61313 on May 21, 2007, and that his probation was terminated on January 9, 2009, before he filed his postconviction petition on May 3, 2012. The court thus found that defendant did not have standing to bring this action under the Act, then dismissed defendant's petition, and released appointed counsel from any obligation as to the postconviction proceeding.

¶ 7 Defendant now appeals that dismissal contending that his cause should be remanded for further proceedings because postconviction counsel provided unreasonable assistance by failing to fulfill the duties of counsel under Rule 651(c). The State responds that defendant has no standing to claim postconviction relief because his probation was terminated in 2009, and, thus, his claims are moot.

¶ 8 The Act provides that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article." 725 ILCS 5/122-1(a) (West 2010). A petitioner has standing under the Act even if not presently imprisoned if his "liberty in some way or another was

curtailed to a degree by the state." *People v. Carrera*, 239 Ill. 2d 241, 246 (2010). Where defendant has fully served his underlying sentence (i.e., any term of imprisonment, probation, or Mandatory Supervised Release) prior to filing his postconviction petition, his liberty is not curtailed by the state, and he is not a "person imprisoned in the penitentiary," as required for standing under the Act. *Id.* at 253.

¶ 9 The record in this case shows that defendant was imprisoned at the time he filed his petition on May 3, 2012; however, his imprisonment was for an unrelated case. In his petition, defendant indicated that he was seeking postconviction relief in case number 05C6-61313, for which he was sentenced to two years' probation. That probation was terminated on January 9, 2009. Thus, at the time he filed his postconviction petition, defendant was not a "person imprisoned in the penitentiary," as required to file a claim for postconviction relief (*People v. West*, 145 Ill. 2d 517, 519 (1991)), and had no standing to do so (*Carrera*, 239 Ill. 2d at 253). Accordingly, his petition was properly dismissed. *People v. Steward*, 406 Ill. App. 3d 82, 90 (2010).

¶ 10 Defendant nonetheless contends that his lack of standing does not absolve counsel of his obligation to comply with Rule 651(c), and that counsel's noncompliance requires a remand for new second-stage proceedings. In support of his contention, defendant cites *People v. Suarez*, 224 Ill. 2d 37, 47 (2007), where the supreme court held that postconviction counsel must comply with Rule 651(c) regardless of whether the claims raised in the petition had merit.

¶ 11 Under the Act, postconviction counsel is required to provide a reasonable level of assistance (*People v. Owens*, 139 Ill. 2d 351, 364 (1990)), and Rule 651(c) imposes explicit

obligations on counsel to ensure that level of representation (*People v. Lander*, 215 Ill. 2d 577, 584 (2005)). The record in this case shows that counsel was cognizant of his responsibilities, and initially advised the court that he had ordered the transcripts so that he could determine how to proceed after being told by defendant that the filing of the petition may have been in error. On the next status date, the court reviewed the procedural history of the case, determined that defendant lacked standing to file a postconviction petition, dismissed it, and relieved counsel from any further obligation in this proceeding.

¶ 12 Lack of standing is a defect that cannot be cured (*Henderson*, 2011 IL App (1st) 090923, ¶ 15) and requires that the petition be dismissed (*Steward*, 406 Ill. App. 3d at 90). As such, it is unlike an affirmative defense, *e.g.*, timeliness, which may be waived or forfeited by the State. *Lander*, 215 Ill. 2d at 584. Since defendant cannot meet the threshold requirement, a remand for further second-stage proceedings would be futile. *Henderson*, 2011 IL App (1st) 090923, ¶ 15.

¶ 13 The fact that the court advanced defendant's petition to the second stage before the standing issue became apparent does not alter this result because defendant was not "imprisoned in the penitentiary" for the offense he was purporting to challenge when he filed his postconviction petition (*West*, 145 Ill. 2d at 519), and, therefore, had no standing to seek relief under the Act (*Carrera*, 239 Ill. 2d at 253). Accordingly, we affirm the dismissal of defendant's petition.

¶ 14 That said, we find that we may consider defendant's request for monetary credit (*People v. Vasquez*, 2013 IL App (2d) 120344, ¶ 23) because defendant's lack of standing does not affect this court's subject-matter jurisdiction (*People v. Henderson*, 2011 IL App (1st) 090923 ¶ 40).

Moreover, improper assessments may be challenged at any time (Ill. S. Ct. R. 615(b) (eff. Aug. 27 1999); *People v. Dalton*, 406 Ill. App. 3d 158, 162 (2010)), and the supreme court has held that a claim for monetary credit may be raised at any time and at any stage of court proceedings, even on appeal in a postconviction proceeding (*People v. Caballero*, 228 Ill. 2d 79, 88 (2008)).

¶ 15 In this case, defendant contends that he should not have been assessed the \$5 Court System Fee. The statute authorizes a \$5 fee where defendant is convicted of a violation of the Illinois Vehicle Code. 55 ILCS 5/5-1101(a) (West 2012). Because defendant was convicted of burglary, which is not a violation of Illinois Vehicle Code, we find that the \$5 fee was improperly assessed and we vacate it.

¶ 16 Defendant next contends that he is entitled to \$10 of presentence custody credit for the two days he spent in presentence custody to offset his \$10 Mental Health Court assessment. Defendant is entitled to \$5 per day for each day he spent in presentence custody to offset his fines. 725 ILCS 5/110-14(a) (West Supp. 2005). Here, defendant spent two days in presentence custody for which he is entitled to \$10. We find that defendant may use that \$10 credit to offset the \$10 Mental Health Court assessment. *People v. Graves*, 235 Ill. 2d 244, 255 (2009).

¶ 17 For the reasons stated, we direct the clerk of the circuit court of Cook County to modify defendant's fines and fees order to reflect the vacation of the \$5 Court System Fee and offset of the \$10 Mental Health Court assessment, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 18 Affirmed; fines and fees order modified.