FIRST DIVISION
November 23, 2015

No. 1-13-3609
2015 IL App (1st) 133609-U

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. 91 CR 193
	)	
ALONZO BRYANT,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Second stage dismissal of defendant's post-conviction petition affirmed over his contention that the Habitual Criminal Act, as applied to him, violated the eighth amendment against cruel and unusual punishment where one of his prior qualifying convictions was committed when he was a juvenile.

¶ 2 Defendant Alonzo Bryant appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). He contends that the Habitual Criminal Act (HCA) (720 ILCS 5/33B-1 (West 1992), now codified at 730 ILCS 5/5-4.5-95 (West 2012)), as applied, violates his eighth amendment right (U.S. Const., amend. VIII) against cruel and

unusual punishment where his sentence of natural life imprisonment was based on a qualifying conviction for his conduct as a juvenile.

¶ 3 This court previously affirmed defendant's 1994 jury conviction for armed robbery which occurred on December 3, 1990, and the sentence of natural life imposed pursuant to the HCA. *People v. Bryant*, 278 Ill. App. 3d 578 (1996). We also affirmed the dismissal of defendant's 2001 *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) which was recharacterized as a post-conviction petition. *People v. Bryant*, No. 1-02-0873 (2004) (unpublished order under Supreme Court Rule 23).

¶ 4 On July 5, 2005, defendant filed another *pro se* section 2-1401 petition, alleging that his natural life sentence was imposed unconstitutionally and was void, and, accordingly, that neither the two-year time limitation or due diligence requirement of section 2-1401 applied. This petition was also recharacterized and dismissed as a post-conviction petition, and on appeal, this court issued a dispositional order remanding the cause for further proceedings under section 2-1401 and compliance with *People v. Shellstrom*, 216 Ill. 2d 45 (2005) and *People v. Pearson*, 216 Ill. 2d 58 (2005). *People v. Bryant*, No. 1-05-2541 (2007) (dispositional order). On remand, the circuit court dismissed defendant's petition without providing the required admonishments, and this court against remanded the cause for compliance with *Shellstrom. People v. Bryant*, No. 1-07-3402 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 6, 2010, defendant filed a *pro se* motion for leave to file a successive post-conviction petition and a supplemental section 2-1401 petition. In his post-conviction petition, defendant alleged, in relevant part, that *Graham v. Florida*, 560 U.S. 48 (2010), prohibited application of the HCA to a juvenile, and that the use of his juvenile conviction to sentence him

to life imprisonment constituted cruel and unusual punishment in violation of the eighth amendment of the Constitution. In his supplemental section 2-1401 petition, defendant again alleged that the use of his juvenile conviction for the purpose of implementing the HCA was improper. The circuit court treated the section 2-1401 petition as a post-conviction petition and denied it without giving proper *Shellstrom* admonishments, causing this court to remand the matter a third time. *People v. Bryant*, No. 1-10-3304 (2012) (unpublished order under Supreme Court Rule 23).

¶ 6 On remand, the circuit court appointed counsel for defendant on his 2005 petition and provided *Shellstrom* admonishments. On April 12, 2013, post-conviction counsel filed a supplemental post-conviction petition, "augment[ing]" the prior *pro se* petitions and alleging that one of defendant's three strikes, which triggered the HCA, was based on a 1976 juvenile conviction, and, therefore, his natural life sentence pursuant to this Act constituted cruel and unusual punishment and was unconstitutional under *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012) and *Graham*, 560 U.S. 48. Counsel also alleged that the eighth amendment prohibits the imposition of a life without parole sentence on a juvenile offender who committed a non-homicide crime, and that the import of the Supreme Court decisions on this matter should apply equally to defendant whose first strike occurred when he was a 16-year-old juvenile.

¶ 7 On June 7, 2013, the State filed a motion to dismiss defendant's petition, alleging that his original petition, which was filed in 2005, was untimely and that neither defendant, nor his counsel, alleged that he was not culpably negligent for the late filing. The State also alleged that defendant's motion for leave to file a successive post-conviction petition and the accompanying 2-1401 petition did not explain why the claims could not have been raised in a timely manner.

¶ 8 In addition to timeliness, the State alleged that defendant's claim was barred by *res judicata* and waiver. The State pointed out that on direct appeal defendant alleged, in relevant part, that the HCA violated due process and the eighth amendment because it required a sentence of natural life without regard to mitigating factors. The State noted that this court rejected defendant's challenge, citing *People v. Dunigan*, 165 Ill. 2d 235, 245-56 (1995), where the supreme court rejected the same eighth amendment claims raised by defendant. *Bryant*, 278 Ill. App. 3d at 585-87. The State also noted that if the issue was not *res judicata*, it was waived because it could have been raised on direct appeal.

¶ 9 The State further claimed that defendant was not entitled to relief based on *Graham* or *Miller* because he was not a juvenile when he committed the instant offense of armed robbery and was thus properly sentenced under the HCA. The State noted that the concern for a juvenile's lack of maturity and potential for reform cited in *Graham* and *Miller* was not present here as defendant was an adult when he committed the instant offense. The State also pointed out that defendant was sentenced under a recidivist statute which prescribes circumstances under which a defendant found guilty of a specific crime may be more severely punished based on his history of prior convictions, and does not have the same policy concerns addressed by the Supreme Court in *Graham* and *Miller*.

¶ 10 In his response, defendant pointed out that he addressed the timeliness issue in his original 2005 petition, where he raised a voidness claim concerning his natural life sentence which may be made at any time. Defendant also responded that any delay on his part may be excused when the petition, as in his case, was based on the issuance of new case law, *i.e.*, *Graham* and *Miller*, which, he claims, changed the applicable law.

¶ 11 The circuit court disagreed with defendant and granted the State's motion to dismiss defendant's petition. In its written order, the court found that defendant's claim was barred by *res judicata* given the First District's rejection of defendant's claim on appeal that his life sentence under the HCA violated the eighth amendment. *Bryant*, 278 Ill. App. 3d at 587. The circuit court noted that defendant was attempting to revive these claims with new Supreme Court case law, namely, *Miller* and *Graham*, which considered the propriety of mandatory life sentences for juvenile offenders, unlike here, where defendant was sentenced to natural life imprisonment when he was in his 30's. The court also observed that the supreme court has made it clear that punishment under the HCA is for the most recent offense only, and the penalty is made heavier because the person convicted is a habitual criminal, citing *Dunigan*, 165 Ill. 2d at 242. In addition, the court observed that the reviewing court in *People v. Banks*, 212 Ill. App. 3d 105, 107 (1991), rejected the contention that a court may not use a juvenile conviction to establish a prior conviction under the HCA. The circuit court thus concluded that defendant's claims failed procedurally and on the merits, and dismissed his petition.

¶ 12 On appeal, defendant contends that the HCA, as applied to him, violates the eighth amendment prohibition against cruel and unusual punishment because one of his qualifying convictions occurred when he was a 16-year-old juvenile. He maintains that the sentence imposed should be graduated and proportioned to both the offender and the offense, citing in support *Miller v. Alabama*, 132 S. Ct. 2455, 2469, *Roper v. Simmons*, 543 U.S. 551, 560 (2005), *Graham*, 560 U.S. 48, and *People v. Miller*, 202 Ill. 2d 328, 343 (2002).

¶ 13 In post-conviction proceedings, a defendant is not entitled to an 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 the circuit court's decision to dismiss defendant's post-conviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 As an initial matter, we address the State's contention that defendant's post-conviction petition, which was originally filed in 2005, was untimely, and that defendant did not state any grounds for why he was not culpably negligent in failing to timely file it. 725 ILCS 5/122-1(c) (West 2012). In response, defendant asserts that the cases relied on by the State were vacated by the supreme court which advised reviewing courts to reconsider their decisions in light of its decision in *People v. Davis*, 2014 IL 115595, ¶26, that a sentence that violates the constitution is void from inception, and may be challenged at any time and in any court, either directly or collaterally. In *Davis*, defendant had challenged the statute as unconstitutional on its face, whereas here, defendant contends that the HCA, *as applied* to him, was unconstitutional as it violated the eighth amendment against cruel and unusual punishment. This court, however, has not precluded defendant from bringing an "as applied" challenge to a statute, despite procedural infirmities (*People v. Emmett*, 264 Ill. App. 3d 296, 297 (1994)), and we will not do so here.

¶ 15 As to the merits of his contention, we observe that on direct appeal, defendant argued that the HCA violates due process and the eighth amendment to the United States Constitution because it requires a sentence of natural life in prison without regard to mitigating factors. *Bryant*, 278 Ill. App. 3d at 587. This court rejected defendant's claim, relying on *Dunigan*, 165 Ill. 2d at 247-48, where the supreme court determined that a statute which mandates a life

sentence without regard to mitigating circumstances does not impose cruel and unusual punishment under the eighth amendment. *Bryant*, 278 Ill. App. 3d at 587-88.

¶ 16 Defendant nonetheless contends that the HCA as applied to him violates the eighth amendment against cruel and unusual punishment where one of his prior qualifying convictions occurred when he was a juvenile. Although defendant has essentially rephrased the eighth amendment argument made on direct appeal by specifying a different factor, the claim is basically the same and thus subject to the application of *res judicata*. *People v. Barrow*, 195 Ill. 2d 506, 522 (2001); *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992). Notwithstanding, we find, for the reasons to follow, that defendant failed to make a substantial showing that his constitutional rights were violated by the imposition of a life term under the HCA, and that his petition was properly dismissed.

¶ 17 In reaching that conclusion, we have considered the cases cited by defendant in support of his argument and find them distinguishable. In *Roper*, 543 U.S. at 575, *Graham*, 560 U.S. at 74, *Miller*, 132 S. Ct. at 2469, and *Miller*, 202 Ill. 2d at 330-31, the defendants were sentenced as juveniles and the courts recognized that children should be treated differently from adults based on certain characteristics which render them underdeveloped and more vulnerable to negative influences and outside pressures. In *Miller*, 132 S. Ct. at 2464, the Supreme Court further noted that based on *Roper* and *Graham*, children are constitutionally different from adults for purposes of sentencing because juveniles have diminished culpability and greater prospects for reform and thus were less deserving of the most severe punishments. Defendant contends that this precedent and the brain science behind it apply equally to him where he was sentenced to life imprisonment based on conduct he committed when he was a juvenile. We disagree.

¶ 18 In the cases cited by defendant, and unlike here, the offenders were juveniles when they were sentenced to harsh mandatory sentences without consideration of their ages or stages of development. In addition, the cited cases do not involve recidivist statutes, such as the HCA, which is meant to punish those who are impervious to the rehabilitative efforts of the State. *People v. Cummings*, 351 Ill. App. 3d 343, 348 (2004). Here, defendant was 34 years old when he was sentenced to natural life imprisonment, and had committed two more felonies thereby showing his inability to reform over the years. Furthermore, the HCA has been found unambiguous and clear in its meaning that any conviction may be used as a former conviction and that no exception is made for a conviction obtained when defendant was a juvenile. *Banks*, 212 Ill. App. 3d at 107. A sentence under this Act is for the most recent crime and not for the convictions which triggered its application. *People v. Wilson*, 257 Ill. App. 3d 826, 836 (1994). We thus find that the HCA was not unconstitutional as applied to defendant.

¶ 19 This determination is consistent with *People v. Lawson*, 2015 IL App (1st) 120751, where the same issue was raised and decided adversely to defendant. Although defendant urges us to find that *Lawson* was incorrectly decided, we find its reasoning sound and continue to follow it.

¶ 20 In *Lawson*, 2015 IL App (1st) 120751, ¶52, this court observed that in enacting mandatory life sentences under the HCA, the legislature considered the rehabilitative potential of offenders by limiting the application of this statute to offenders who have a third serious felony conviction within a prescribed period of time, and that offenders have the opportunity to present mitigating evidence and demonstrate their rehabilitative potential when they are sentenced for their first two serious felony offenses. This Act is only imposed after defendant has twice shown that conviction and imprisonment do not deter him from a life of crime. *Lawson*, 2015 IL App

(1st) 120751, ¶52. This court then determined that defendant was being punished for his third offense, and where he commits his third felony while an adult, his prior juvenile convictions may be considered for imposition of a life sentence under the HCA. *Lawson*, 2015 IL App (1st) 120751, ¶53. Similarly here, defendant was an adult when he committed the third offense, had been given the opportunity to present mitigating factors at the sentencing proceedings on his two prior felonies and had not demonstrated the ability to reform. Thus, the HCA, as applied to him, is not unconstitutional.

¶ 21 Defendant finally contends that the circuit court failed to consider the financial impact of a sentence of natural life imprisonment, requesting that this court reverse the dismissal of his petition, vacate his sentence and remand the cause for resentencing. We note, however, that only constitutional issues may be *raised* in a post-conviction petition, and that the challenged provision is statutory and not a proper ground for post-conviction review. *People v. Shaw*, 49 Ill. 2d 309, 311 (1971); *People v. Johnson*, 2015 IL App (2d) 140388, ¶3. Moreover, the HCA is a mandatory provision, and thus, precludes consideration of mitigating evidence (*People v. Franzen*, 183 Ill. App. 3d 1051, 1059 (1989)), and further, the issue, raised for the first time on appeal, is waived (*People v. Jones*, 213 Ill. 2d 498, 508 (2004)).

¶ 22 In light of the foregoing, we affirm the second stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 23 Affirmed.