

2015 IL App (2d) 131055-U
No. 2-13-1055
Order filed December 23, 2015

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 99-CF-2399
)	
JUSTIN HILL,)	Honorable
)	Rosemary Collins,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing defendant's postconviction petition, as defendant made a substantial showing that he was denied the benefit of his plea bargain and that the untimeliness of his petition was not due to his culpable negligence: taken as true in light of the record, the petition established that (1) the parties agreed that defendant's sentence would run concurrently with a federal sentence and (2) he filed his petition only five days after discovering that that promise could not be fulfilled.

¶ 2 In 2001, defendant, Justin Hill, pleaded guilty to first-degree murder (720 ILCS 5/9-1(a) (West 2000)). In exchange for the plea, defendant received the minimum 20-year sentence, which was to be served concurrently with other state and federal sentences. In 2010, defendant

filed a postconviction petition. He alleged that he had recently learned that he would have to serve his federal sentence at the conclusion of his Illinois sentence. Defendant alleged that he had received the ineffective assistance of counsel and that he did not receive the benefit of his bargain with the State. On the State's motion, the trial court dismissed the petition, finding it untimely and without substantive merit. Defendant appeals, contending that the petition makes a substantial showing that he was denied the benefit of his bargain and that the untimely filing was not the result of his culpable negligence. We reverse and remand.

¶ 3 In 2001, defendant pleaded guilty to the murder of Jermaine Jackson. In exchange for the plea, defendant received the minimum 20-year sentence, to be served concurrently with state and federal sentences in Tennessee.

¶ 4 In 2010, defendant filed a postconviction petition. He alleged that he had no reason to question the promise of concurrent sentences until he talked to a prison counselor about his release date. He learned that a federal detainer had been issued in 2005, meaning that he would have to serve his federal sentence at the conclusion of his Illinois sentence. After learning this, he filed his petition five days later.

¶ 5 The trial court found that the petition was not frivolous. The court appointed counsel, who filed an amended petition that attached a copy of the federal detainer, as well as defendant's affidavit. The State moved to dismiss, and the court granted the motion. It found that the petition was untimely and that the late filing was due to defendant's culpable negligence. It further found that defendant had received the benefit of his bargain with the State. Defendant timely appeals.

¶ 6 Defendant contends that the petition pleads enough facts to warrant a third-stage hearing on whether he was denied the benefit of his plea bargain and whether the late filing was due to

his culpable negligence. The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) allows criminal defendants to assert that their convictions or sentences resulted from substantial denials of their federal or state constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding has three stages. In the first stage, the defendant files a petition and the trial court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the trial court does not dismiss the petition at the first stage, it is then docketed for further consideration. *Id.*

¶ 7 At the second stage, the trial court may appoint counsel for the defendant. 725 ILCS 5/122-4 (West 2012). After counsel has made any necessary amendments to the petition, the State may move to dismiss it. 725 ILCS 5/122-5 (West 2012). At the second stage, all well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Throughout the second and third stages, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). We review a second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 8 Defendant's petition alleges that the basis of his plea was the agreement that all sentences would run concurrently. His affidavit states that he "would not have plead[ed] guilty under these terms had I known that some other sentence or period of incarceration would have later been imposed."

¶ 9 The record supports defendant's assertion that the promise of concurrent sentences was an integral part of the plea agreement. During the plea hearing, defense counsel presented the proposed agreement to the court. The parties agreed that defendant's sentence in this case would run concurrently with both the state and federal sentences in Tennessee. The prosecutor stated his agreement, and the sentencing order specifically so provides. The federal detainer, however,

establishes that defendant will have to serve his federal sentence after he completes the sentence imposed in this case, in violation of the plea agreement.

¶ 10 In *People v. Whitfield*, 217 Ill. 2d 177, 185 (2005), the supreme court recognized that a defendant is denied due process when he pleads guilty based on a promise that is not fulfilled. The court stated that, “ ‘when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’ ” (Emphasis omitted.) *Id.* (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). Thus, taking as true the petition’s allegations, defendant has made a substantial showing that he was denied the benefit of his bargain.

¶ 11 The State argues, in essence, that defendant suffered no prejudice because he received the minimum sentence available. However, the State ignores the significant difference between a 20-year sentence served concurrently with defendant’s other sentences and what is in practical terms a 26-year sentence if he must serve his full federal sentence afterward. Further, had he not been induced to plead guilty by the promise of concurrent sentences, defendant could have gone to trial in hope of winning an outright acquittal.

¶ 12 The State seems to argue that it should not be bound by its promise regarding the federal sentence, because it had no authority to require the federal prison system to honor the agreement. The short answer is that the prosecution should not have made a promise that it could not keep. *Whitfield* cited with approval *Commonwealth v. Zuber*, 353 A.2d 441 (Pa. 1976). There, as an inducement to plead guilty, the prosecution promised to recommend that the defendant serve his sentence concurrently with the balance of defendant’s prior sentence, which was not permitted under Pennsylvania law. The Pennsylvania Supreme Court held that the defendant was nevertheless entitled to the benefit of his bargain. *Id.* at 459-60. The court ordered that the

defendant's sentence be modified to comport as nearly as possible with the sentence the parties originally contemplated. *Id.* at 461.

¶ 13 Defendant further contends that he is entitled to an evidentiary hearing on whether his late filing of the petition was the result of his culpable negligence. Section 122-1(c) of the Act provides that if no appeal is filed, a postconviction petition “shall be filed no later than *** 3 years from the date of [the petitioning defendant's] conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (West 2012).” “The phrase ‘culpable negligence’ contemplates something greater than ordinary negligence and is akin to recklessness.” *People v. Ramirez*, 361 Ill. App. 3d 450, 452 (2005). Section 122-1(c)'s exception for delay not due to culpable negligence covers cases of delay due to the late discovery of a claim. *People v. Davis*, 351 Ill. App. 3d 215, 218 (2004).

¶ 14 Here, defendant alleged that he did not learn of the federal detainer until 2010, and he supports the allegation with his own affidavit. We must take this allegation as true for purposes of a second-stage dismissal. *Pendleton*, 223 Ill. 2d at 473. Defendant argues persuasively that, prior to that time, he had no reason to question the prosecution's promise that the sentences would be concurrent. Moreover, he filed the petition within a week of learning that the federal prison system would require him to serve his full federal sentence. Thus, he contends, he was not culpably negligent for filing the petition beyond the three-year limitation period.

¶ 15 The State responds that in 2005 the federal detainer directed that a copy be provided to defendant and that we must assume that this was done. Clearly, the direction that a copy of the detainer be provided to defendant does not conclusively establish that this was done and, as noted, we must take defendant's contrary allegation as true at this stage. The direction that

defendant receive a copy of the detainer at most creates a factual issue for resolution at a third-stage hearing.

¶ 16 The State further argues that no third-stage hearing is necessary because defendant has “had a hearing” on whether he was culpably negligent for the late filing. The State apparently refers to the hearing on the State’s motion to dismiss. As defendant argues in his reply brief, the hearing on the issue whether the allegations of defendant’s petition were legally sufficient cannot be equated with an evidentiary hearing on the truth of those allegations

¶ 17 The judgment of the circuit court of Winnebago County is reversed, and the cause is remanded for an evidentiary hearing.

¶ 18 Reversed and remanded.