

No. 1-13-1629

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 05 CR 6665
	)	
CORNELL DRAPES,	)	Honorable
	)	Kenneth Wadas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Liu and Justice Connors concurred in the judgment.

**ORDER**

**Held:** Defendant's post-conviction petition filed after his original sentence had been vacated but before he was resentenced did not ripen into a justiciable petition upon resentencing. Additionally, we affirm the dismissal of Defendant's properly filed post-conviction petition in the first stage of the post-conviction proceeding because Defendant's petition is patently without merit.

¶ 1 On October 21, 1990, Jamanti Jackson was shot and killed in a Chicago alley. Shortly thereafter, Chicago police began looking for Defendant as their prime suspect but were unable to locate him. On October 30, 1990, an arrest warrant was issued for Defendant in the murder of Jamanti Jackson. Defendant had fled the state and went to New Orleans, where he began living under a different name. While in New Orleans, Defendant was arrested five times. It was not until January 4, 2005 that Chicago police were notified that Defendant was in the custody of the New Orleans police department. Defendant was transported back to Illinois, convicted and sentenced to 60 years' imprisonment for the murder. In his first direct appeal, this court affirmed Defendant's conviction but vacated his sentence. On remand, but before resentencing, Defendant filed his first post-conviction petition pursuant to 725 ILCS 5/122-1. This petition was never ruled upon. On May 31, 2012, Defendant was resentenced. After resentencing, Defendant filed another post-conviction petition. The trial court did rule on this petition. The trial court dismissed the petition at the first stage of a post-conviction proceeding after finding it was without merit.

¶ 2 Before this court, Defendant raises two issues on appeal: (1) whether Defendant's 2011 Petition filed while Defendant awaited resentencing ripened upon resentencing and has now been pending for over 90 days, requiring remand, the appointment of counsel, and advancement to second stage post-conviction proceedings and; (2) whether Defendant's 2012 Petition dismissed by the trial court as frivolous and patently without merit stated the gist of a claim that Defendant's due process right to a speedy trial was violated. For the reasons stated below we find that Defendant's 2011 Petition did not ripen into a justiciable petition at the time of his resentencing. Additionally, the trial court did not error when it dismissed Defendant's 2012 Petition at the first stage because Defendant's petition is patently without merit.

¶ 3

### JURISDICTION

¶ 4 The trial court originally sentenced Defendant on December 11, 2007. On appeal, this court vacated Defendant's sentence and remanded for Defendant to be resentenced. Defendant was resentenced on May 31, 2012. On October 22, 2012, Petitioner filed a petition for post-conviction relief pursuant to 725 ILCS 5/122-1. The trial court denied the petition on January 18, 2013. Defendant filed a motion to reconsider, which was denied on April 23, 2013. Defendant filed a Notice of Appeal on May 10, 2013. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 651(a). Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 651 (eff. Feb. 6, 2013).

¶ 5

### BACKGROUND

¶ 6 Our Background recites facts limited for the determination of the controlling issues presented in this case. Defendant, Cornell Drapes, was indicted on 15 counts of first degree murder, two counts of armed robbery, two counts of unlawful use of a weapon and two counts of unlawful use of a weapon by a felon for the shooting and killing of 15-year-old Jamanti Jackson.

¶ 7 On October 21, 1990, Jamanti Jackson was shooting craps in an alley on Waller Avenue in Chicago, Illinois when he was shot and killed. Detectives began looking for Defendant shortly thereafter but were unable to locate him. On October 30, 1990, an arrest warrant was issued for Defendant's arrest. Fourteen years later, on January 4, 2005, Chicago detectives were notified that Defendant had been arrested in New Orleans, Louisiana. On February 14, 2005, detectives flew to New Orleans, placed Defendant into custody, and brought him back to Illinois.

¶ 8 After a trial, a jury found Defendant guilty of first degree murder, and the trial court sentenced him to 60 years' imprisonment. Petitioner appealed his conviction and sentence. On appeal, Defendant argued that he was denied his Sixth Amendment right to a speedy trial and

that the trial court considered an improper aggravating factor when sentencing. We found no violation of Defendant's speedy trial rights, but did find that an improper aggravating factor was considered in sentencing. Accordingly, we vacated and remanded for resentencing.

¶ 9 Prior to resentencing Defendant filed a post-conviction petition on February 8, 2011 pursuant to 725 ILCS 5/122-1 (hereinafter "2011 Petition"). Defendant alleged that his trial counsel was ineffective for failing to investigate and properly argue a motion to dismiss based on a speedy trial violation. Defendant contended that trial counsel failed to argue that the pre-indictment and pre-arrest delay was attributable to the State and that counsel was ineffective for advising Defendant to withdraw his motion to suppress identification. Defendant also alleged that trial counsel was ineffective for failing to investigate, interview, and call potential witnesses, failing to cross-examine witnesses and confront them with hearsay statements, failing to make objections, failing to impeach witnesses, failing to attack their credibility, failing to argue the inconsistencies in the testimony of the People's witnesses, failing to raise issues contained in his motion for a new trial on appeal, and for failing to argue trial counsel's ineffectiveness. Defendant also claimed he was not proven guilty beyond a reasonable doubt, the People improperly admitted other crimes evidence, the People made improper comments during closing argument, and the court improperly admitted hearsay.

¶ 10 At the next hearing date after the 2011 Petition had been filed, the trial court inquired of Defendant how he wanted to proceed on the petition because Defendant had yet to be resentenced. The record shows Defendant initially indicated he wanted to withdraw the petition. However, upon further questioning, Defendant indicated he wanted to discuss the matter with his attorney. The trial court told Defendant that if he did not tell the court what he wanted to do with the 2011 Petition, the court would rule on it because of the 90-day window.

¶ 11 On March 23, 2011, the court reviewed the history of Defendant's case, and noted that Defendant's 2011 Petition was pending. The court expressed skepticism that the 2011 Petition was properly filed because the trial court believed Defendant needed to be resentenced before he could raise any issues in a post-conviction petition. However, erring on the side of caution, because the Defendant had raised claims of ineffective assistance of counsel, the court appointed a public defender to review Defendant's 2011 Petition, withdraw it and file an amended version. Subsequently, appointed counsel informed the court that she anticipated filing a post-trial motion.

¶ 12 On December 11, 2011, appointed counsel informed the court that there were no issues that could be included in a post-trial motion. She stated that Defendant had raised a number of issues that fell within the scope of the post-conviction hearing act, but agreed with the court's previous statements that it was not ripe at this point. Appointed counsel asked the court if she should file a Rule 651(c) certificate, however, the court told appointed counsel to "screen the record looking for issues because it came back for resentencing ... [s]o that's it." No Rule 651(c) certification was ever filed and the record does not show any more action was taken by the court concerning Defendant's 2011 Petition.

¶ 13 On May 31, 2012, at resentencing the trial court reduced Defendant's sentence by one year, to 59 years in prison. Defendant appealed this new sentence to this court. We affirmed the new sentence but ordered corrections to the mittimus, reflecting the correct pre-sentence credit and good time calculations. (See No. 1-12-1745, Summary Order).

¶ 14 On October 22, 2012, Defendant filed a second post-conviction petition (hereinafter "the 2012 Petition"). The claims contained in the 2012 Petition were substantially similar to those raised in the 2011 Petition. Defendant expanded on his claim concerning the speedy trial

violation, adding an allegation that counsel should not have relied upon 725 ILCS 5/103-5 to argue the error, but rather should have pursued a strategy pursuant to 730 ILCS 5/3-8-9, and/or addressed the issue in terms of pre-indictment and pre-arrest delay. Defendant added a *Brady* violation claim, contending that the State should have produced evidence that he did not know about the warrant, that there was no detainer on record, and that he was not the cause of the delay.

¶ 15 The trial court treated the 2012 Petition as a first stage petition and summarily dismissed it on January 18, 2013. Defendant filed a Motion to Reconsider on February 8, 2013, which he subsequently supplemented on February 29, 2013, with substantial portions of the 2011 Petition. On April 23, 2013, the court denied the motion for reconsideration and on April 26, 2013 ruled that the order would stand. Defendant timely filed a Notice of Appeal on May 10, 2013.

¶ 16 Defendant raises two issues on appeal: (1) whether Defendant's 2011 Petition filed while Defendant awaited resentencing ripened upon resentencing and has now been pending for over 90 days, requiring remand, the appointment of counsel, and advancement to second stage post-conviction proceedings and; (2) alternatively, whether Defendant's 2012 Petition dismissed by the court as frivolous and patently without merit stated the gist of a claim that Defendant's due process right to a speedy trial was violated.

¶ 17 ANALYSIS

¶ 18 The first issue on review is whether the 2011 Petition filed by Defendant while awaiting resentencing ripened at the time of his resentencing and should now be advanced to the second stage of a post-conviction proceeding because it was not ruled upon in 90 days after it ripened.

¶ 19 This issue is one of statutory interpretation concerning the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 (West 2012) ("the Act"), so our review is *de novo*. *People v. Harris*, 224 Ill. 2d 115, 123 (2007).

¶ 20 The Illinois Post-Conviction Hearing Act states that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that: (1) in the proceedings which resulted in his or her conviction there was substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 55/122-1(a)(1) (West 2012). Subsection (b) of the Act provides that "[t]he proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified affidavit." 725 ILCS 5/122-1(b) (West 2012). Subsection (f) provides that only one petition may be filed absent leave of court. 725 ILCS 5/122-1(f) (West 2012).

¶ 21 In *People v. Woods*, 193 Ill. 2d 483 (2000), the Illinois supreme court addressed a related issue of when a petition is timely under the Act. *Id.* at 485-86. The court found that time limitations contained within the Act begin to run when a person is "convicted." *Id.* The court determined that under the Act, " 'date of conviction' means the date that final judgment including sentence was entered." *Id.* at 489. The court found equating conviction to mean both an adjudication of guilt and the imposition of a sentence to be consistent with the purpose of the Act because it "is intended to provide a remedy for constitutional violations that occur at trial or sentencing." *Id.* "The Act thus contemplates that a petitioner will raise in one post-conviction petition all constitutional issues, whether they relate to trial or sentencing." *Id.* (internal citations omitted). In *People v. Hager*, the court reaffirmed that the term conviction as used in the Act "is a term of art which means a final judgment that includes both conviction *and* sentence." 202 Ill.

2d 143, 149 (2002) (emphasis in original). The court held that when the appellate court vacated defendant's sentence, "defendant did not stand 'convicted' for the purposes of the Post-Conviction Hearing Act." *Id.* at 149. "In other words, a defendant who is not 'convicted' cannot file a post-conviction petition." *Id.*

¶ 22 Therefore, we find that Defendant's 2011 Petition did not ripen into a valid petition under the Act when he was resentenced in May 2012 and the failure of the trial court to rule on it within 90 days did not require automatic advancement to the second stage.<sup>1</sup> This court vacated Defendant's sentence on a direct appeal in January 2011, and Defendant filed his petition a month later in February 2011. Thus, when Defendant filed his 2011 Petition he was not "convicted" as required under the Act because he had no sentence to challenge. The 2011 Petition cannot be a challenge to his later resentencing because the resentencing had yet to occur at the time the Defendant filed the 2011 Petition.

¶ 23 Our determination is consistent with our Supreme Court's pronouncement in *Hager* that "a defendant who is not 'convicted' cannot file a post-conviction petition." 202 Ill. 2d at 149. The Defendant's reliance on *People v. Ladd*, for the proposition that the 2011 Petition ripened into a valid petition upon resentencing is misplaced. 185 Ill. 2d 602 (1999). *Ladd* involved a motion filed by Defendant under the Illinois Speedy Trial statute, a completely different statute from the Illinois Post-Conviction Hearing Act. *Id.* at 607.

¶ 24 We note that in *People v. Martin-Trigona*, 111 Ill.2d 295 (1986), our supreme court indicated that a defendant awaiting resentencing may file a post-conviction petition. 111 Ill.2d 295, 302 ("a *fortiori*, a convicted person who yet to be sentenced can bring an action under the Act since, either serving a sentence or awaiting a sentence as in *Martin-Trigona's* case, the

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<sup>1</sup> We note that the Third District recently came to the same conclusion in *People v. Thompson*, 2014 IL App (3d) 120895-U.



convicted person who has not completed his sentence is prevented from fully exercising the liberties enjoyed by free people.). However, we chose not to follow the decision in *Martin-Trigona* as it conflicts with the supreme court's later decisions in *Wood* and *Hager*, which expressly require that a person must be found guilty and sentenced before they may proceed under the Act.

¶ 25 Next, Defendant contends that the trial court erred when it dismissed his 2012 Petition at the first stage. On appeal from a first-stage dismissal in a post-conviction proceeding, our review is *de novo*. *People v. Robinson*, 217 Ill. 2d 43, 60 (2005).

¶ 26 The Illinois Post-Conviction Hearing Act provides a method by which a person under criminal sentence can assert that his or her conviction was the result of a substantial denial of his or her rights under the United State Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 (West 2012). A post-conviction proceeding contains three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the circuit court must, within 90 days of the petitioner's filing, independently review the petition, taking the allegations as true, and determine whether "the petition is frivolous or patently without merit." *Edwards*, 197 Ill. 2d at 244; 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition, then the petition advances to the second stage, where the trial court may appoint counsel to an indigent defendant and where the State can file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4 (West 2012); 725 ILCS 5/122-5 (West 2012).

¶ 27 Section 5/122-2 of the Act requires that a post-conviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West

2012). With respect to this requirement, a petitioner at the first stage need only present a limited amount of detail in the petition. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Previously, courts have held that petitioners must meet the low threshold of stating the "gist" of a constitutional claim. *People v. Porter*, 122 Ill. 2d 64, 74 (1988). In fact, reviewing courts have required only that a petitioner allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). As such, when speaking of the "gist" of a constitutional claim, reviewing courts have meant that the "section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9. However, this does not excuse a petitioner from providing any factual detail to support his or her claim. *Id.* at 10. Section 5/122-2 requires a petitioner to attach "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012).

¶ 28 The gist of the constitutional claim is viewed within the framework of the frivolous or patently without merit test. *Hodges*, 234 Ill. 2d at 11. Under this framework, a trial court can summarily dismiss a petition as frivolous or patently without merit if it has no arguable basis in law or in fact when it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16. An indisputably meritless legal theory is one which is completely contradicted by the record. *Id.* Fanciful factual allegations are ones that are fantastic or delusional. *Id.* In reviewing post-conviction petitions, all well-pleaded facts are accepted as true unless they are positively rebutted by the trial record. *People v. Lander*, 215 Ill. 2d 577, 586 (2005).

¶ 29 On appeal, Defendant contends that the 2012 Petition made the gist of a constitutional claim that trial counsel was ineffective in presenting the motion to dismiss based on speedy trial

grounds. In Defendant's direct appeal after resentencing, we addressed his right to a speedy trial pursuant to the Sixth Amendment of the United States Constitution. *People v. Drapes*, 402 Ill. App. 3d 1185 (2010) (unpublished order under Supreme Court Rule 23). In this appeal, Defendant now claims that the 2012 Petition concerns his right to a speedy trial under the Fifth Amendment to the United States Constitution. Specifically, Defendant alleges in his brief before this court that "the delay between issuing and executing the arrest warrant is a Fifth Amendment problem, although he does not use that language."

¶ 30 Whether Defendant's attorney was ineffective for failing to raise a Fifth Amendment claim is reviewed under the two-pronged test set forth in *Strickland v. Washington*. 446 U.S. 668, 687 (1984). Under this standard, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that because of this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense. *People v. Hickey*, 204 Ill. 2d 585, 613 (2001). "Prejudice exists when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Erickson*, 183 Ill. 2d 213, 224 (1998) (citations omitted). A petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffectiveness. *People v. Morgan*, 187 Ill. 2d 500, 529-30 (1999). Additionally, a criminal petitioner is guaranteed the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985).

¶ 31 In *People v. Lawson*, the Illinois supreme court set forth the applicable test to determine if the delay in the present appeal violated defendant's due process rights. 67 Ill. 2d 449 (1977). In that case, the court stated:

¶ 32 Where there has been a delay between an alleged crime and indictment or arrest or accusation, the defendant must come forward with a clear showing of actual and substantial prejudice. Mere assertion of inability to recall is insufficient. If the accused satisfies the trial court that he or she has been substantially prejudiced by the delay, then the burden shifts to the State to show the reasonableness, if not the necessity, of the delay. If this two-step process ascertains both substantial prejudice and reasonableness of a delay, then the court must make a determination based upon a balancing of the interests of the defendant and the public. Factors the court should consider, among others, are the length of the delay and the seriousness of the crime. 67 Ill. 2d 449, 453 (1977).

¶ 33 We find that Defendant's claim of ineffective assistance of trial counsel and appellate counsel regarding a purported failure to raise a Fifth Amendment violation regarding the delay between issuing and executing the arrest warrant completely without merit. Defendant's 2012 Petition fails to establish the pre-indictment delay resulted in substantial prejudice as required by *Lawson*. Defendant's 2012 Petition simply argues that he was prejudiced solely because the State of Illinois failed locate him in New Orleans during one his four previous arrests there and bring him back to Illinois sooner. Such an argument fails to establish a showing of substantial and actual prejudice. While Defendant claims that two witnesses died in the intervening years he does not state who they are or what their testimony would have been. Accordingly, Defendant's 2012 Petition fails to set forth any facts demonstrating actual prejudice from the delay.

¶ 34 Defendant reliance on *People v. Gulley*, for the proposition that if enough time has passed prejudice must be presumed is misplaced. 83 Ill. App. 3d 1066, 1069 (1980) citing *People v. Nichols*, 60 Ill. App. 3d 919 (1978). Even after finding the 51 month delay was presumptively

prejudicial, the court still required the defendant to come forward with facts establishing actual prejudice from the long delay. *Gulley*, 83 Ill. App. 3d at 1070 ("[s]everal important facts will illustrate the actual prejudice to the defendant from such a long delay as in the present case."). Unlike the defendants in *Gulley* and *Nichols*, Defendant puts forth no facts showing actual prejudice.

¶ 35 Because Defendant could not show actual and substantial prejudice in the delay between the crime and the indictment, Defendant has failed to establish that his trial or appellate attorney's actions were deficient under *Strickland* for failing to raise such an argument. Accordingly, Defendant's 2012 Petition is patently without merit and properly rejected by the trial court.

¶ 36

#### CONCLUSION

¶ 37 For the foregoing reasons, we find no error in the trial court's failure to consider the 2011 Petition and we affirm the order dismissing Defendant's 2012 Petition in the first-stage of the proceedings under the Illinois Post-Conviction Hearing Act.

¶ 38 Affirmed.