2016 IL App (1st) 140724-U

SIXTH DIVISION
Order Filed: February 5, 2016

No. 1-14-0724

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 17363 (01)
	)	
VERNON CHAPMAN,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of the defendant's *pro se* postconviction petition is reversed and the cause remanded, where the circuit court erred in determining that the defendant was without standing to seek relief under the Post-Conviction Hearing Act. The fines, fees and costs order is amended to assess $2,000 in controlled substance fees, and the mittimus is corrected to reflect the appropriate offense of which the defendant was convicted.

¶ 2 The defendant, Vernon Chapman, appeals from the circuit court's summary dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), based upon the determination that he lacked standing. In addition to challenging the

basis for the dismissal, the defendant also asserts that the court improperly imposed a controlled substance assessment against him under section 411.2(i) of the Criminal Code of 1961 (Code) (720 ILCS 570/411.2(i) (West 2006)), and that his mittimus must be corrected to reflect the correct statutory provision for which he was convicted. For the reasons that follow, we reverse and remand for further proceedings. We additionally order that the fines, fees and costs order be amended to reflect the proper controlled substance assessment, and that the mittimus be corrected.

¶ 3 The defendant was indicted for various offenses stemming from his role in a conspiracy to sell narcotics. On July 14, 2008, the circuit court entered a plea of guilty on behalf of the defendant for a single count of criminal drug conspiracy (720 ILCS 570/405.1(a) (West 2006)), a Class 1 felony. He was sentenced as a Class X offender to six years' imprisonment, including a period of mandatory supervised release. The court also imposed fines, fees and costs, including a $3000 controlled substance assessment under section 411.2 of the Code (720 ILCS 570/411.2 (West 2008)).

¶ 4 On or about July 15, 2008, the defendant sent a written letter to the circuit court expressing his desire to withdraw his plea. However, at a subsequent status hearing on August 7, 2008, the defendant stated to the court that he had been mistaken and, in fact, had no intention to seek a vacatur of the plea. No appeal was taken from the conviction.

¶ 5 On January 23, 2012, the defendant mailed four *pro se* pleadings to the circuit court to be filed: a motion for the appointment of counsel, a motion to proceed *in forma pauperis*, and two petitions for postconviction relief. The defendant's postconviction petitions (collectively petition) alleged, *inter alia*: (1) his actual innocence; (2) that his counsel was ineffective for failing to properly advise him regarding his guilty plea and investigate a specific alibi witness;

and (3) that his bond was excessive. All four of the *pro se* documents were stamped as "received" by the clerk of the circuit court on January 23, 2012, and the motions for the appointment of counsel and to proceed *in forma pauperis* were marked as "filed" on February 2, 2012, and set for a hearing. However, the defendant's postconviction petitions were never stamped as filed, recorded in the half sheet, or set for a hearing.

¶ 6 At the February 9, 2012, hearing, the assistant State's Attorney expressed confusion regarding the defendant's pending motions, noting to the court that the defendant was "asking for appointment of [an] attorney" but that he failed to state "what he wants an attorney for." The court continued the matter to await the receipt of the defendant's court file, and on February 16, 2012, entered an order denying the defendant's motion for the appointment of counsel on the basis that the defendant had provided no grounds for such an appointment. The order made no reference to the defendant's postconviction petition. The court sent the defendant notification of the disposition and the defendant subsequently filed a motion to reconsider the denial of his motion for the appointment of counsel. The court denied the motion on March 29, 2012.

¶ 7 On March 21, 2012, the defendant filed a *pro se* notice of appeal, requesting that the court "reconsider" his postconviction petition (*People v. Chapman*, No. 1-12-1092). The circuit court appointed counsel from the Office of the State Appellate Defender to represent the defendant. In the course of the appeal, defense counsel discovered that the petition, though received by the clerk of the circuit court along with the defendant's motions for the appointment of counsel and to proceed *in forma pauperis*, had never been placed on the court's call for a ruling. Defense counsel notified the clerk's office of the oversight, and on December 11, 2013, the clerk's office stamped the defendant's petition as filed and set it for a hearing on December 18, 2013.

¶ 8 On February 13, 2014, the circuit court entered an order dismissing the petition based upon a finding that the defendant lacked standing. The court determined that, as of June 4, 2013, the defendant had completed serving his six-year sentence and mandatory supervised release resulting from his conviction of July 14, 2008. As his petition was not filed until December 11, 2013, the court found the defendant no longer had standing to seek relief under the Act, based upon the holding in *People v. Carrera*, 239 Ill. 2d 241 (2010).

¶ 9 On February 21, 2014, the defendant filed the instant appeal from the order of February 13, 2014. This court granted a motion by the defendant to dismiss his prior appeal (No. 1-12-1092).

¶ 10 The defendant's primary assignment of error is directed at the dismissal of his petition for an alleged lack of standing. He does not dispute that his sentence had been fully served by June of 2013, months before the clerk's office stamped his petition as filed and docketed it for a hearing. However, he asserts he actually "filed" the petition on January 23, 2012, while he remained incarcerated, and that he should not be deprived of standing based upon the failure of the clerk's office to timely docket his petition and set it for a hearing. The State has conceded error on this point, and we agree.

¶ 11 Under the express language of the Act, postconviction relief is reserved for "person[s] imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2012); *Carrera*, 239 Ill. 2d at 245. The objective of this provision is to make the Act's remedy available to individuals actually being deprived of their liberty, and not to those who have served their sentences and seek only to purge their criminal records. *Carrera*, 239 Ill. 2d at 245-46. "Imprisonment" under the Act has been construed to encompass any manner in which a defendant's freedom has been curtailed by the State, and includes a sentence of probation or mandatory supervised release. *Id*. at 246.

Relief also has been extended to defendants who have timely filed petitions, and then complete their sentences while postconviction proceedings remain pending. See *Carrera*, 239 Ill. 2d at 246 (citing *People v. Davis*, 39 Ill. 2d 325 (1968)); see also *People v. Jones*, 2012 IL App (1st) 093180, ¶ 10 (where defendant had timely filed his petition, postconviction relief held not moot, even though, due to delays in the court system, defendant completed his sentence during the pendency of his appeal from the dismissal of his petition). The essential requirement is that the defendant still be serving his imposed sentence at the moment of the "initial timely filing of his petition" under the Act. *Jones*, 2012 IL App (1st) 093180, ¶ 10; see also *Carrera*, 239 Ill. 2d at 245-46.

¶ 12 In this case, it is undisputed that the defendant possessed standing under the Act when he attempted to file his petition on January 23, 2012, and it was stamped as received by the clerk's office. The clerk's office, "upon receipt" of the petition, was required to "docket the petition for consideration by the court *** and bring the same promptly to the attention of the court." 725 ILCS 5/122-1(b) (West 2012). However, for some unexplained reason, not attributable to any fault of the defendant, the clerk's office never fulfilled its duties under section 122-1(b). Further, upon receiving notice from the court regarding the disposition of his other pending motions, the defendant filed a timely *pro se* appeal on March 21, 2012, seeking a "reconsideration" of his petition. Even then, it was not until December of 2013 that the petition was finally stamped as filed and set for a hearing. Under these circumstances, it would "frustrate justice to shut the door on the one avenue" for the defendant to obtain relief from his conviction on constitutional grounds, owing simply to an error on the part of the court clerk. *Jones*, 2012 IL App (1st) 093180, ¶ 12. We therefore hold that, as the defendant had standing when he originally filed his petition, he was not divested of such by the subsequent inaction on the part of the circuit court

clerk. See *Jones*, 2012 IL App (1st) 093180, ¶ 1 (a statutory civil cause of action that is timely filed cannot be rendered moot by subsequent events).

¶ 13 Notwithstanding the error of the circuit court, the State argues that reversal is unwarranted in this case, because our review from the dismissal of a postconviction petition is *de novo* (*Carrera*, 239 Ill. 2d at 245) and we may affirm it on any basis shown by the record. Thus, the State urges that we embark upon a review of the allegations in the petition and determine whether it is frivolous and patently without merit.

¶ 14 The State cites no direct authority supporting its suggested course of action, and it must be rejected. At the first stage of postconviction proceedings, the Act requires that the circuit court make an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002); *People v. Carter*, 383 Ill. App. 3d 795, 798 (2008). Here, it is apparent the court's order disposed of the petition based solely upon the defendant's lack of standing, and did not entertain his constitutional claims. It is not the function of a reviewing court to engage in the initial examination of these claims, and we therefore decline to do so. See *Carter*, 383 Ill. App. 3d at 798.

¶ 15 For his part, the defendant maintains that, on remand, this case must advance directly to second-stage proceedings because the court failed to determine within 90 days whether his petition was frivolous or patently without merit. We disagree.

¶ 16 Section 122–2.1 of the Act dictates that, within 90 days of the filing and docketing of a petition, the court must review the petition and "enter an order thereon," or else it must docket the case for second-stage proceedings. 725 ILCS 5/122-2.1 (West 2008); *People v. Steward*, 406 Ill. App. 3d 82, 88 (2010). Our supreme court has determined that, for purposes of the 90-day

requirement, a case is "filed and docketed" within the meaning of the Act when the circuit court clerk enters it into the case file and sets it for a hearing. *People v. Brooks*, 221 Ill. 2d 381 (2006).

¶ 17 In this case, the petition was not properly "filed and docketed" under *Brooks* until December 11, 2013. On February 13, 2014, well within the 90-day period, the circuit court entered its order dismissing the petition for the defendant's lack of standing. A lack of standing is deemed to be a ruling on the merits under section 122-2.1 of the Act, or, put another way, encompassed as a finding that the petition is "frivolous and patently without merit." *Steward*, 406 Ill. App. 3d 90-91 (citing *Boclair*, 202 Ill. 2d at 101). Therefore, as there was a ruling on the merits within the 90-day period under the Act, there is no basis to advance this case for second-stage proceedings.

¶ 18 Next, the defendant asks that this court reduce the $3,000 controlled substance assessment imposed upon him under section 570/411.2(i) of the Code (720 ILCS 570/411.2(i) (West 2006)) to $2,000, because this is the appropriate fine for his conviction of a Class 1 felony. The State concedes this argument. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(4) (eff. October 1, 2015), we instruct the circuit court clerk to amend the fines, fees and costs order to reflect a controlled substance assessment of $2,000.

¶ 19 The defendant also seeks a correction of the mittimus to reflect a conviction under section 570/405.1(a) of the Code (720 ILCS 570/405.1(a) (West 2006)), rather than section 5/405.1(a), as is currently stated. As the State also concedes this issue, we exercise our authority under Illinois Supreme Court Rule 615 (eff. October 1, 2015), and order that the mittimus be corrected to reflect that the defendant was convicted under 720 ILCS 570/405.1(a) of the Code.

¶ 20 For the foregoing reasons, we reverse the summary dismissal of the defendant's petition for postconviction relief, and remand this case for first-stage proceedings under the Act. We also order that the fines, fees and costs order, and the mittimus, be corrected.

¶ 21 Reversed and remanded. Fines, fees and costs order and mittimus corrected.