

2016 IL App (1st) 141362-U
No. 1-14-1362
December 13, 2016

SECOND DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Respondent-Appellee,)	Of Cook County.
v.)	No. 02 CR 22180
LEON BARNES,)	The Honorable
Petitioner-Appellant.)	William H. Hooks,
	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* A document labeled as a postconviction petition, filed without authorization from the named petitioner, has no effect on the named petitioner's rights, unless the named petitioner ratifies the filing. A document a defendant labeled as a successive postconviction petition counts as an initial postconviction petition when the petitioner adequately alleges that he or she did not authorize the filing of a prior document labeled as his or her postconviction petition. When defendant alleges that counsel failed to inform him of the mandatory 25 year enhancement of the sentence for crimes committed with firearms, and that he rejected a plea deal because he did not know about the actual range of sentences he faced if the court found him guilty as charged, defendant stated the gist of a claim for a violation of his constitutional right to assistance of counsel.

¶ 2 Leon Barnes appeals from an order denying his motion for leave to file a successive postconviction petition. In the proposed petition, Barnes alleged that he had not authorized the filing of a prior postconviction petition, purportedly filed on his behalf, and that his trial counsel provided ineffective assistance by failing to inform him of the range of sentences he faced if the trial court found him guilty as charged. The trial court found that Barnes's proposed petition did not meet the cause and prejudice test, so the court denied his request for leave to file. In this appeal, we hold that the unauthorized filing of a purported postconviction petition has no effect. Because Barnes adequately alleged that he did not authorize the filing of the prior petition, the petition Barnes sought leave to file counts as his initial postconviction petition. We also find that Barnes adequately alleged facts that could support a finding that he received ineffective assistance of counsel. Accordingly, we reverse the trial court's judgment and remand for further proceedings on Barnes's postconviction petition.

¶ 3 **BACKGROUND**

¶ 4 In August 2002, a grand jury charged Barnes with first degree murder in the shooting death of Nelson Arias. A private attorney, Catharine O'Daniel, represented Barnes in pretrial proceedings and at trial. Barnes requested a Rule 402 conference to discuss the possibility of a deal in exchange for a guilty plea. See Ill. S. Ct. R. 402 (eff. July 1, 2012). The State made an offer, and O'Daniel encouraged him to accept the offer, but he chose to go to trial.

¶ 5 A jury found Barnes guilty as charged. In January 2005, the trial court sentenced Barnes to 75 years in prison. The court appointed the State Appellate Defender to represent Barnes

on appeal. The appellate court affirmed the conviction and sentence. *People v. Barnes*, No. 1-05-1166 (2006) (unpublished order under Supreme Court Rule 23).

¶ 6 On June 7, 2007, Tim Biasiello, a private attorney, filed a document he referred to as a postconviction petition for Barnes. The trial court dismissed the petition as frivolous. The court addressed notice of the dismissal only to Biasiello.

¶ 7 In November 2013, Barnes, *pro se*, filed a motion for leave to file a successive postconviction petition. He alleged that he "had no knowledge of Attorney Tim Biasiello's existence and did not become aware a petition was filed until petition had already been denied." Barnes specified that Biasiello filed the purported postconviction petition without Barnes's "knowledge, authorization or approval."

¶ 8 Barnes attached a letter he received from O'Daniel in 2009. O'Daniel responded to Barnes's question about the petition Biasiello filed, and to a second question. O'Daniel said that in light of Barnes's argument on the direct appeal that O'Daniel had provided ineffective assistance, she could not help him further. Barnes also attached a letter he received from the Attorney Registration and Disciplinary Commission (ARDC), responding to a complaint Barnes filed regarding Biasiello's conduct. In a letter dated July 1, 2013, the ARDC said:

"Mr. Biasiello acknowledged that he did not speak to you before he filed the petition. ***

Although we share your concerns regarding Mr. Biasiello[']s fail[ure] to communicate with you before taking action on your behalf, it appears that the attorney's error was an isolated infraction of our Rules, which rarely results in formal discipline. Further, as you may know, allegations of your attorney's failure

to fulfill any duties to you, including his duty to consult with you, are appropriately raised in court through motions for a new trial, appeals, and petitions for post-conviction relief."

¶ 9 As substantive grounds for postconviction relief, Barnes alleged that O'Daniel told him before trial that the charges against him carried a sentence of 20 to 60 years in prison. O'Daniel did not inform Barnes that because the State charged him with shooting Arias, if a jury found him guilty as charged, the law required the trial court to add a 25 year enhancement to his sentence, making the minimum sentence 45 years, and the maximum 85 years. Barnes alleged that the misinformation concerning the sentencing range caused him to reject the State's offer of a 20 year sentence if he pled guilty. O'Daniel, in the letter attached to the petition, supported the allegation concerning the offer, as she said:

"I have always felt that one of your stronger arguments [for appeal] was that although you were offered twenty years on a plea, you were sentenced to seventy-five years after you declined the State's offer ***. In my view, the judge imposed a significant 'trial tax' of more than double the State's offer. As I have said on numerous occasions and at the time, I wish desperately that you had accepted the State's offer."

¶ 10 The trial court several times continued the proceedings on the petition Barnes filed in November 2013. On March 26, 2014, the court entered a written order in which it held that Biasiello's conduct sufficiently established cause for the successive postconviction petition, but the court found no prejudice. The court dismissed as lacking credibility Barnes's allegation that he would have accepted the plea bargain if he knew the actual sentencing

range he faced. The court denied the motion for leave to file the postconviction petition. Barnes now appeals.

¶ 11

ANALYSIS

¶ 12

Barnes contends: (1) the trial court should have treated the proposed petition as an initial postconviction petition; (2) because the trial court failed to dispose of the petition within 90 days after the court received it, we should remand with instructions to advance the petition to the second stage of postconviction proceedings; (3) the trial court should have advanced the petition to the second stage because it states the gist of a constitutional claim; and (4) if the court correctly treated the petition as successive, it should have permitted him to file it because the petition met the cause and prejudice test.

¶ 13

Initial or Successive Petition

¶ 14

Barnes argues first that he had a right to file his 2013 petition as his initial postconviction petition. The ARDC said that Biasiello admitted that he filed the 2007 petition without consulting Barnes and without even informing Barnes of his intent to file the petition.

¶ 15

This court has explained how parties create an attorney-client relationship:

"In general, the law of principal and agent applies to an attorney-client relationship. [Citation.] To act for a client, an attorney must have either actual or apparent authority to do so. [Citation.] *** '[T]he words and conduct of the alleged principal, not the alleged agent,' create an agency relationship. *First American Title Insurance Co. v. TCF Bank*, 286 Ill. App. 3d 268, 274 (1997). ***

When an attorney appears of record on behalf of a party, a rebuttable presumption arises that the party authorized the attorney to do so. *Gray v. First National Bank*, 388 Ill. 124, 129 (1944); [citation.] When, however, 'the facts show a lack of authorization, express or implied, and there is no proof of ratification, the acts of counsel are a nullity.' *Gray*, 388 Ill. at 129." *Lydon v. Eagle Food Centers*, 297 Ill. App. 3d 90, 93-94 (1998).

¶ 16 In *Lydon*, Lydon filed a complaint against Eagle Food Centers in Lake County, and in 1996, she voluntarily dismissed the complaint. When she sought to refile the action in 1997, Eagle moved to dismiss because attorney Robert Cleveland, purportedly acting on Lydon's behalf, had previously filed an action against Eagle in Cook County. Lydon "filed an affidavit stating that she does not know Cleveland, has never spoken with Cleveland, and never retained Cleveland to represent her." *Lydon*, 297 Ill. App. 3d at 94. The appellate court found that because no affidavit contradicted Lydon's affidavit, and no words or conduct of Lydon appeared to make Cleveland her attorney, Cleveland lacked authority to file the Cook County complaint. The court concluded that the Cook County filing did not affect Lydon's right to refile her complaint in Lake County. *Lydon*, 297 Ill. App. 3d at 94.

¶ 17 We see no significant distinction between this case and *Lydon*. Biasiello filed a petition in the trial court. Barnes, in an uncontradicted affidavit, said that Biasiello filed the petition without speaking with Barnes, and Barnes never authorized Biasiello to file anything or to act on Barnes's behalf. Barnes's words and conduct show that he never accepted Biasiello as his attorney. Thus, the petition Biasiello filed does not affect Barnes's right to file an initial postconviction petition. See also *Zych v. Jones*, 84 Ill. App. 3d 647, 651-52 (1980)

(defendant's affidavit overcame presumption that he authorized attorney to act on his behalf); *Foley v. Metropolitan Sanitary Dist. of Greater Chicago*, 213 Ill. App. 3d 344, 352 (1991); *Meldoc Properties v. Prezell*, 158 Ill. App. 3d 212, 217 (1987).

¶ 18 The State, citing *In re Detention of Swope*, 213 Ill. 2d 210 (2004), contends that Barnes must meet the standards for a successive petition, because he presented the document as a successive petition. In *Swope*, defense counsel obtained an expert to examine Swope, but Swope's treatment team refused to discuss his condition with Swope's expert. Defense counsel agreed with the State that defense counsel would depose treatment team members and the expert would use the depositions in his evaluation of Swope. The appellate court noted that Swope's attorney may have agreed to a violation of Swope's due process rights, but found the violation could not provide grounds for reversing the trial court's judgment. The *Swope* court said, "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *Swope*, 213 Ill. 2d at 217.

¶ 19 The State asks us to hold a *pro se* defendant to standards applicable to attorneys, in proceedings for which the State does not offer the aid of an attorney. Moreover, in *Swope*, Swope sought to use his attorney's error as grounds for a new trial. Here, Barnes only seeks to have proper standards applied to his mislabeled petition, where the mislabeling cost the trial court virtually no time or effort.

¶ 20 In postconviction proceedings, "the threshold for a petition to survive the first stage of review is low. [Citation]. If a petition alleges sufficient facts to state the gist of a constitutional claim, even where the petition lacks formal legal argument or citations to authority, first-stage dismissal is inappropriate." *People v. Allen*, 2015 IL 113135, ¶ 24.

¶ 21 We find the reasoning of *People v. Smith*, 386 Ill. App. 3d 473 (2008), applicable here. Smith sought to challenge his conviction, and he labeled his *pro se* request as a petition under section 2-1401 of the Code of Civil Procedure. (735 ILCS 5/2-1401 (West 2006)). The trial court dismissed the petition, finding that Smith did not meet the time constraints for a 2-1401 petition. The appellate court held:

“It has long been recognized that a lack of legal knowledge might cause a *pro se* prisoner to select the wrong method to collaterally attack his conviction.

* * *

A *pro se* defendant is not necessarily master of his claim, and the court may override his choice of procedural vehicle by which to seek relief. [Citation.] Where a *pro se* defendant files a pleading alleging a deprivation of a constitutional right cognizable under the Act, the trial court may recharacterize it as a postconviction petition, and the petition may be recharacterized even if it is clearly labeled as another type of pleading. [Citation.] A pleading is not determined by the label applied to it by the defendant, but by its content and character. [Citation.] Recharacterizing a petition protects a *pro se* litigant from the possible harsh result arising from his lack of legal knowledge in selecting a method to attack his conviction.” *Smith*, 386 Ill. App. 3d at 476-78.

¶ 22 We recognize that our supreme court rejected part of the reasoning of *Smith* and held that a trial court has no duty to recharacterize a *pro se* litigant’s petition if the *pro se* litigant chooses the wrong legal form for his petition. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010). But here, Barnes properly labeled his petition correctly as a petition brought under the Post-

Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). He only failed to recognize that, because he had not authorized Biasiello to appear on his behalf or to file the 2007 document labeled as a postconviction petition, his 2013 petition counted as an initial postconviction petition. The court, and not the *pro se* petitioner, should bear responsibility for finding and recognizing the import of *Lydon*. The trial court erred when it failed to recognize that Barnes first challenged the judgment entered in 2005 when he filed his petition in 2013 and that under the Act Barnes had a right to file the petition challenging the 2005 judgment without leave of the court.

¶ 23 Next, the State argues that Barnes ratified Biasiello's acts by failing to file a new postconviction petition until 2013, when he learned of Biasiello's filing before June 2009. When Barnes contacted O'Daniel about Biasiello's petition, O'Daniel did not advise Barnes that he could treat the 2007 petition as a nullity. Barnes apparently thought that Biasiello's unauthorized petition foreclosed his limited opportunity to file a postconviction petition.

¶ 24 In *Lydon*, Eagle similarly asserted that Lydon ratified Cleveland's act of filing a complaint in Cook County. The *Lydon* court said:

"Ratification is a form of equitable estoppel involving the express or implied adoption of the acts of another by one for whom the other assumes to be acting * * *.' *Swader v. Golden Rule Insurance Co.*, 203 Ill. App. 3d 697, 704 (1990). The rationale behind the doctrine is that the person ratifying the action obtains a benefit through the person who is acting on his behalf. [Citation.] Before ratification will be found, the principal must have full knowledge of the facts and the choice to either accept or reject the benefits of the transaction. [Citation.] A

principal can ratify an action by taking 'a position inconsistent with nonaffirmation of the action.' *Athanas* [*v. City of Lake Forest*], 276 Ill. App. 3d [48] at 56 [(1995)]. ***

*** First, defendant has not shown what, if any, benefits plaintiff received from the filing of the Cook County action, let alone shown that she accepted any benefits. *** Moreover, her actions, instead of indicating that she was adopting Cleveland's activities, indicate that she was disavowing her connection with the Cook County action. ***

After reviewing the record, we believe that defendant has not provided sufficient evidence to prove, as a matter of law, that an agency relationship existed between plaintiff and Cleveland, or that plaintiff ratified Cleveland's actions. Without such proof, Cleveland's act of filing suit in Cook County must be deemed null." *Lydon*, 297 Ill. App. 3d at 95-96.

¶ 25 Again, we find no significant distinction between this case and *Lydon*. Barnes derived no benefit from the filing of the frivolous 2007 petition. Once Barnes learned of the filing, he took steps appropriate for a non-lawyer to disavow Biasiello's acts. He contacted his trial attorney, and later he contacted the ARDC to complain of Biasiello's unauthorized conduct. On this record, where the ARDC said Biasiello admitted that he acted without contacting Barnes, where Barnes derived no benefit from Biasiello's acts, and where Barnes's complaints about the acts show no ratification, we find that the trial court erred when it failed to recognize that Barnes had presented an initial postconviction petition, not a successive postconviction petition.

¶ 26

90 Day Rule

¶ 27

Barnes argues that we must remand with instructions to advance the petition to the second stage of postconviction proceedings, because the trial court failed to rule on the petition within 90 days after the court received it. See *People v. Little*, 2012 IL App (5th) 100547, ¶¶ 22-24. Under the Post-Conviction Hearing Act, "90 days after the filing and docketing of each petition" (725 ILCS 5/122-2.1(a) (West 2012)), the trial court loses the statutory authority to dispose of a petition as frivolous. *People v. Porter*, 122 Ill. 2d 64, 85 (1988). Because the trial court denied Barnes's request for leave to file the petition, we find that the 90-day period established in section 122-2.1 never began to run. Although the trial court had a duty to permit Barnes to file this initial postconviction petition (see 725 ILCS 5/122-1(b), (f) (West 2012)), we will not treat the case as though the court met that duty. On *de novo* review of the decision not to permit Barnes to file his initial postconviction petition, we must determine whether Barnes stated the gist of a claim that his conviction or sentence resulted from a substantial denial of his constitutional rights. See *People v. Hodges*, 234 Ill. 2d 1, 10-12 (2009).

¶ 28

Ineffective Assistance of Counsel

¶ 29

Barnes argues that he adequately stated a claim that his trial counsel provided ineffective assistance because counsel failed to inform him of the actual sentencing range he faced if the jury found him guilty as charged. We review Barnes's petition under the standard stated in *Hodges*, 234 Ill. 2d at 17:

"To prevail on a claim of ineffective assistance *** a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness'

and that the deficient performance prejudiced the defense. [Citation.] At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced."

¶ 30 For a claim based on rejection of a proposed plea bargain, we use the test set out in *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012), quoted in *People v. Hale*, 2013 IL 113140, ¶ 19:

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

¶ 31 Here, as in *Hale*, the parties discuss only the first *Frye* requirement, that Barnes must show he would have accepted the State's offer if his counsel had advised him correctly about the sentencing range. That is, the State does not argue that it would have rescinded the offer before Barnes had a chance to accept it, and the State does not contend that the trial court

would have refused to sentence Barnes in accord with the State's offer. Since the offer arose in a conference Barnes requested under Supreme Court Rule 402 (eff. July 1, 2012), we see no reason to doubt that the court would have entered a sentence in accord with the recommendation. See *People v. Garza*, 2014 IL App (4th) 120882, ¶ 28 (parties to plea deals can avoid mandatory firearm enhancements by amending the indictment).

¶ 32 Also, the State does not challenge the adequacy of Barnes's allegation that O'Daniel failed to inform him of the applicable sentencing range. Counsel's performance fell below an objective standard of reasonableness when she failed to inform Barnes, before he rejected the proposed plea bargain, about the actual range of sentences he faced if a jury found him guilty as charged. See *People v. Curry*, 178 Ill. 2d 509, 531 (1997) (on a direct appeal, defendant presented sufficient evidence that he rejected a plea deal because his attorney misinformed him about the minimum sentence he faced); *People v. Barghout*, 2013 IL App (1st) 112373, ¶¶ 15-18 (allegation in postconviction petition that defendant rejected plea deal because counsel misinformed defendant of minimum sentence sufficiently stated gist of constitutional claim).

¶ 33 On the issue of whether counsel's error prejudiced Barnes, the State contends that *People v. Miller*, 393 Ill. App 3d 629 (2009) mandates dismissal of Barnes's petition as frivolous. The trial court in *Miller* sentenced Miller to 53 years in prison. In a postconviction petition, Miller alleged that the State had offered a plea bargain for 20 years in prison, and Miller refused the offer because Miller's counsel failed to inform him of the mandatory 25 year firearm enhancement, which meant that he actually faced a sentencing range of 45 years to life, not 20 to 60 years, if the jury found him guilty as charged. Miller said in his affidavit

that he would have accepted the plea bargain if he knew of the actual sentencing range. He also attached an affidavit from his mother, who said she would have advised Miller to take the plea bargain if she knew of the actual sentencing range. The *Miller* court held:

"The only reasonable inference to be drawn from the defendant's rejection of the minimum sentence of 20 years for first degree murder is that the defendant desired to pursue his constitutional right to trial, to assert his claim of self-defense. In other words, his overriding desire was to fight the first degree murder charge. Of course, if convicted of first degree murder, he could do no better than a 20-year sentence that he claims he was offered upon a plea of guilty. Under these circumstances, it cannot be denied that the defendant elected to 'roll the dice,' with full knowledge that he could be sentenced to as many as 60 years upon being convicted of first degree murder.

* * *

*** [T]he defendant's claim that he would have pled guilty had he known that he faced a greater minimum sentence than he was offered to plead guilty to, standing alone, amounts to no more than "subjective, self-serving [testimony,] insufficient to satisfy the *Strickland* requirement for prejudice." ' *Curry*, 178 Ill. 2d at 531, quoting *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th. Cir.1988)." *Miller*, 393 Ill. App. 3d at 636-39.

¶ 34

That is, the *Miller* court rejected Miller's affidavit as lacking credibility. We cannot reconcile *Miller* with the standards delineated in *Hodges* and *People v. Coleman*, 183 Ill. 2d 366 (1998), for a first-stage dismissal of a postconviction petition. Under *Coleman*, the

postconviction court must accept as true all well-pleaded allegations of the postconviction petition, unless the record positively rebuts those allegations. *Coleman*, 183 Ill. 2d at 385. The trial court may dismiss the petition as frivolous only if the defendant based it on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17. To comply with *Hodges*, the *Miller* court needed to find Miller's allegation -- that he would have accepted the plea offer -- fanciful. We cannot consider Barnes's similar allegation here fanciful.

¶ 35 Barnes had grounds to believe that, if a jury found him guilty, he faced a sentence in the range of 20 to 60 years, with a realistic hope for a sentence towards the lower end of that range due to his age and lack of criminal background. Barnes's rejection of a bargain for a 20 year sentence stands on a very different footing from a defendant's rejection of a bargain for a 20 year sentence when the defendant knows that the law requires the trial court to enhance his sentence to at least 45 years in prison if the jury finds him guilty as charged.

¶ 36 The United States Supreme Court, in *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012), found credible an allegation that the defendant in that case would have accepted a plea bargain, when the sentence imposed after trial greatly exceeded the bargain offered, and the defense counsel failed to inform the defendant of the actual sentence range. Here, the State offered a plea bargain for a 20 year sentence, and the court imposed on Barnes a sentence more than 3 times as long. We find that Barnes has stated the gist of a claim that his counsel provided objectively unreasonable assistance when she failed to inform him of the mandatory sentencing enhancement for crimes committed with a firearm, and he has alleged facts which could support a finding that he suffered prejudice due to counsel's error. Accordingly, we

reverse the trial court's judgment and remand for the court to permit Barnes to file the postconviction petition and for the advancement of the petition to the second stage of postconviction proceedings.

¶ 37

CONCLUSION

¶ 38

The document Biasiello filed without authorization from Barnes has no effect on Barnes's right to file a postconviction petition. The postconviction petition Barnes filed in 2013 stands as his initial postconviction petition. Barnes alleged facts that could support a finding that his trial counsel provided objectively unreasonable assistance when she failed to inform him of the mandatory 25 year enhancement for crimes committed with a firearm, and she failed to inform him that if a jury found him guilty as charged, the trial court would impose a sentence between 45 years and 85 years in prison. Barnes also adequately alleged that he suffered prejudice because the misinformation led him to reject the State's offer of a sentence far below the statutory minimum in exchange for a guilty plea. Accordingly, we reverse the trial court's judgment and remand for the trial court to advance the petition to the second stage of postconviction proceedings.

¶ 39

Reversed and remanded.