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2016 IL App (3d) 140150-U

Order filed February 3, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0150
v.)	Circuit No. 05-CF-751
)	
IGNACIO JACOBO,)	Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Case remanded for second-stage postconviction proceedings where trial court did not dismiss the petition as frivolous and patently without merit at the first stage of the proceedings.

¶ 2 Defendant, Ignacio Jacobo, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), challenging his convictions for felony murder. He appeals, arguing that the trial court erred in denying his motion to vacate judgment at the first

stage of the postconviction proceedings. We reverse the summary dismissal and remand for a second-stage hearing.

¶ 3

FACTS

¶ 4

In April of 2005, defendant was charged with aggravated arson, knowing murder and felony murder of Maria and Merary Nunez. A jury found him guilty of all charges, and the trial court sentenced him to a mandatory term of natural life. Defendant appealed, and this court affirmed his conviction and sentence for two of the four murder charges. *People v. Jacobo*, No. 3-08-0088 (2009) (unpublished order under Supreme Court Rule 23). We also remanded the cause for a *Krankel* hearing on defendant's claims that trial counsel was ineffective. *Id.*

¶ 5

On remand, the trial court concluded that none of the ineffective assistance claims provided a basis for finding that defense counsel had been ineffective. The trial court denied defendant's motion for a new trial, and he appealed. On appeal, we concluded that the trial court properly considered defendant's allegations of ineffective assistance and affirmed its ruling. *People v. Jacobo*, No. 3-11-0047 (2012) (unpublished order under Supreme Court Rule 23).

¶ 6

In December 2013, defendant filed a petition for relief from judgment under the Act. In his petition, he claimed that his trial counsel was ineffective for failing to argue a motion to suppress and for neglecting to challenge his sentence.

¶ 7

On December 18, 2013, the trial court conducted a hearing to consider the petition. The report of proceedings shows that an assistant State's Attorney was present on behalf of the State's Attorney's office. She addressed the court and presented a copy of defendant's petition. The trial court noted that the petition asked the court to "vacate the void portion of defendant's conviction." It then acknowledged that the petition was "40 something pages" long and asked the clerk to set the matter for a hearing at a later date. The court concluded by stating, "I would

like the opportunity to at least examine what he has written. Give me a two month date." The cause was rescheduled for February 5, 2014, and the hearing was adjourned. The docket entry for that date provides: "People present by COLLEEN M. GRIFFIN. Matter comes on *pro se* motion to vacate void portion of conviction. Petition denied."

¶ 8 On January 7, 2014, the clerk mailed defendant notice of an adverse judgment pursuant to Illinois Supreme Court Rule 651(b). Ill. S. Ct. R. 651(b) (eff. April 26, 2012). The letter indicated that "on 12/18/2013 the Court entered an order, a copy of which is enclosed herewith." The correspondence included a statement that defendant had the right to appeal and informed defendant that he needed to file a notice of appeal to preserve his rights within 30 days from the date the order was entered. No order was attached to the notice.

¶ 9 Approximately three weeks later, defendant filed a motion to vacate judgment, asking the court to vacate the judgment entered on December 18, 2013. In his motion, defendant stated that he received a letter informing him that the court had denied his petition and argued that the denial should be vacated because he was not served with notice of the adverse judgment within 10 days of dismissal, as required by statute, and the order dismissing his petition was not attached to the notice.

¶ 10 On February 4, 2014, at a hearing on the motion, the prosecutor informed the court that it had dismissed defendant's postconviction petition on December 18, 2013. She then asked the court to deny defendant's motion to vacate. The court agreed and entered an order denying defendant's request.

¶ 11 ANALYSIS

¶ 12 Defendant argues that this cause should be remanded for second-stage proceedings because the trial court did not dismiss his petition as frivolous and patently without merit at the first stage of the postconviction proceedings.

¶ 13 The Post-Conviction Hearing Act allows criminal defendants to assert that their convictions or sentences resulted from substantial denials of their federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of a postconviction proceeding, the defendant files a petition; the trial court then has 90 days to examine the petition and determine whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). A *pro se* petition seeking postconviction relief may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. If the trial court does not summarily dismiss the petition at the first stage, it is docketed for further consideration and proceeds to the second stage. *Gaultney*, 174 Ill. 2d at 418.

¶ 14 Here, the report of proceedings demonstrates that defendant's petition was not summarily dismissed at the first stage of the postconviction proceedings. Defendant filed his petition on December 6, 2013. Twelve days later, the trial court read the first page of defendant's *pro se* petition in open court and concluded that it needed more time to sufficiently examine the allegations. The court then instructed the clerk to set the matter for a hearing on February 5, 2014, 62 days after the filing date. The clerk did not set the matter for a hearing. Instead, it mistakenly mailed a letter to defendant informing him that his petition had been dismissed. The letter was mailed more than 10 days after the December 18 hearing, and the clerk failed to include a copy of the court's order allegedly dismissed the petition. See Ill. S. Ct. R. 651(b) (eff. April 26, 2012). At the hearing on defendant's motion to vacate the dismissal, the clerk's errors

