2017 IL App (1st) 093516-U

FIFTH DIVISION
March 17, 2017

No. 1-09-3516

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 of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 516
	)	
DARREN WILSON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of *pro se* postconviction petition affirmed where defendant failed to satisfy the requirements of section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2008)); defendant's claim regarding the trial court's failure to make a record finding of his criminal history as required by section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2008)), rendered sentence voidable and not subject to collateral attack; mittimus corrected to reflect a single conviction for murder.

¶ 2 Defendant Darren Wilson appeals the dismissal of his combined *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), and section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). He contends that the circuit court erred in summarily dismissing his postconviction petition where he set forth the gist of a constitutional claim regarding ineffective assistance of plea counsel who failed to file a motion to withdraw his guilty plea as he had requested. He also contends that the cause must be remanded for resentencing because the trial court sentenced him to an agreed term without a presentence investigation report (PSI) or a specific finding on the record of his criminal history, as required by section 5-3-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-3-1 (West 2008)). Finally, he claims that his mittimus should be amended to reflect one conviction for murder where there was only one decedent.

¶ 3 This appeal is before us for the second time following remand from our supreme court pursuant to a supervisory order.

¶ 4 On appeal, this court originally concluded that defendant's *pro se* postconviction petition was properly summarily dismissed when defendant's "affidavit" attached in support of the petition was not notarized, and nothing in the excerpts from defendant's plea hearing supported defendant's claim that he told counsel that he wished to withdraw his plea or that counsel promised to take action to withdraw the plea. See *People v. Wilson*, 2011 IL App (1st) 093516-U, ¶¶ 7-13. This court further determined that defendant's claim that the trial court failed to make a record finding of his criminal history as required by section 5-3-1 of the Unified Code rendered defendant's sentence voidable rather than void and therefore not subject to attack in a collateral proceeding. See *Id.* ¶¶ 15-18. This court finally corrected defendant's mittimus to

reflect a single conviction for first degree murder because there was only one victim. See *Id.* ¶ 19.

¶ 5 On November 4, 2015, our supreme court denied a petition for leave to appeal filed by defendant, but directed this court to vacate our judgment and reconsider the matter in light of *People v. Allen*, 2015 IL 113135, to determine whether a different result was warranted. Upon reconsideration, we once again affirm the trial court's judgment and correct the mittimus.

¶ 6 The record sets forth that on October 4, 1994, defendant entered a fully negotiated plea of guilty to one count each of intentional murder and felony murder in exchange for the State's dismissal of eleven other charges and the recommendation of a sentence of 65 years' imprisonment, concurrent with a sentence previously imposed upon an unrelated armed robbery conviction. After acknowledging the plea agreement between the parties, the trial court admonished defendant of the minimum and maximum sentence for murder, including the possibility of a life sentence or death, and the mandatory supervised release term upon his release from the penitentiary. Defendant stated that he understood the admonitions and the consequences of pleading guilty. In response to the trial court's questions, he persisted in his guilty plea, indicated that his plea was voluntary and that no one had forced him to plead guilty. The defense then stipulated to the factual basis for the murder charges, and the trial court accepted defendant's plea of guilty to two counts of first degree murder. Defendant waived his right to a presentence investigation report and was sentenced in accordance with the negotiated plea agreement. The trial court then admonished defendant of his right to appeal and how to perfect it, but defendant took no action to do so.

¶ 7 Fifteen years later, on September 1, 2009, defendant filed the subject *pro se* petition for relief from judgment pursuant to the Act and section 2-1401 of the Code. In his combined

petition, defendant alleged, in pertinent part, that trial counsel promised "he would file a motion for a sentence reduction at minimum before the 30 day limit but would first speak with [defendant] about withdrawing the plea as that is what [defendant] actually wanted to do and told [counsel] to withdraw the plea," but then did not follow through on his promise and avoided defendant. As support for his combined petition, defendant attached his own "affidavit" claiming that he is actually innocent and always wanted to prove his innocence in a trial, and that he would have insisted on going to trial had it not been for trial counsel's threat that he would lose at trial and receive the death penalty. He also attached three pages of the plea hearing transcript.

¶ 8 The circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit; and entered a *sua sponte* dismissal of his section 2-1401 petition based on defendant's failure to advance a claim or defense warranting postjudgment relief. Defendant now appeals from that ruling, and our review is *de novo*. *People v. Delton*, 227 Ill. 2d 247, 255 (2008).

¶ 9 Whether defendant's postconviction claims survive the first stage of the postconviction proceedings is dependent upon whether defendant's petition conforms to the requirements of the Act. See *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002); *Delton*, 227 Ill. 2d at 254-55. Section 122-2 of the Act requires that the petitioner either provide "affidavits, records, or other evidence" to support the petitioner's allegations or explain the absence of such documentation. 725 ILCS 5/122-2 (West 2008). The purpose of the affidavits, records, or other evidence requirement in section 122-2 of the Act is to establish that a petition's allegations are capable of objective or independent corroboration. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In other words, "[t]he legislature intended that the circuit court at the first stage would look to whether the petition alleges a constitutional deprivation and whether petitioner's proffered evidence substantially

indicates the availability of admissible evidence in support of his claim, in a way that can be corroborated through later proceedings." *People v. Allen*, 2015 IL 113135, ¶ 33. The lack of notarization on a statement styled as an evidentiary affidavit does not prevent the court from reviewing the petition's substance in order to determine whether it sets out a constitutional claim for relief. *Id.* ¶ 34. If, however, the defendant fails to attach any evidence in support of his claim, then he must provide an explanation as to why the affidavits or other documents are unobtainable. *Collins*, 202 Ill. 2d at 66-67 (citing 725 ILCS 5/122-2 (West 2000)).

¶ 10 Here, the underlying basis of defendant's claim of ineffective assistance is that trial counsel promised "he would file a motion for a sentence reduction at minimum before the 30 day limit but would first speak with [defendant] about withdrawing the plea as that is what [defendant] actually wanted to do and told [counsel] to withdraw the plea," but then did not follow through on this promise and avoided defendant. Defendant's affidavit in support of the petition was not notarized; rather it contains the verification requirement pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2008)).

¶ 11 The State relies on *Collins* to argue that the allegations contained in the *pro se* petition are contradicted by the record and unsupported by affidavits or other evidence. The State also notes that the failure to either attach the necessary supporting documentation or explain their absence is "fatal" to a postconviction petition and, alone, justifies its summary dismissal. *Id.* at 66. Defendant responds that *Collins*, where no affidavits were filed in compliance with the documentation requirement set forth in section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), is factually distinguishable and inapplicable to the instant case, where the only affidavit he could furnish, other than his own sworn statement, was that of trial counsel. In his reply brief,

defendant further argues that he has satisfied the documentation requirement of section 122-2 based on his "affidavit and excerpts from the trial transcripts to support his claims."

¶ 12 Our supreme court specifically addressed the issue of whether an unnotarized affidavit can satisfy section 122-2 of the Act in *People v. Allen,* 2015 IL 113135. In that case, the defendant alleged in his postconviction petition, *inter alia*, that the State suborned perjury to convict him and coerced confessions from him and his codefendants. *Id.* ¶ 14. Attached to his petition was a "signed statement" from Robert Langford (Langford statement). *Id.* The Langford statement indicated that Langford, along with a now-deceased accomplice, committed the murder for which the defendant was convicted. *Id.* The Langford statement was dated, signed, and contained a statement that it was made under the penalty of perjury. *Id.* The circuit court dismissed the petition as frivolous and patently without merit. *Id.* ¶ 15. The appellate court affirmed the dismissal, holding that due to the lack of notarization on the Langford statement, the petition did not comply with section 122-2 of the Act. *Id.* ¶ 17. The appellate court also rejected an argument by the defendant that, even if the Langford statement did not qualify as an affidavit, it would still qualify as "other evidence." *Id.*

¶ 13 Our supreme court first determined that the Langford statement was not an affidavit as it was not "a 'statement sworn to before a person who has authority under the law to administer oaths.' " *Id.* ¶ 31 (quoting *Roth v. Illinois Farmers Insurance Co.,* 202 Ill. 2d 490, 494 (2002)). The court then went on to consider "whether the lack of notarization on this statement renders the petition frivolous or patently without merit, or whether the Langford statement might otherwise qualify as sufficient evidence to survive the first stage." *Id.* The court held that the lack of notarization "does not prevent the court from reviewing the petition's 'substantive virtue' as to whether it 'set[s] forth a constitutional claim for relief.' " *Id.* ¶ 34 (quoting *People v.*

Hommerson, 2014 IL 115638, ¶ 11). The court explained that the failure to notarize "does not limit the Langford statement's identification of the 'sources, character, and availability' of evidence alleged to support the petition, or destroy its ability to show that the petition's allegations are capable of independent corroboration." *Id.* (quoting *Delton,* 227 Ill. 2d at 254). Accordingly, "the circuit court may not dismiss at the first stage solely for failure to notarize a statement styled as an evidentiary affidavit." *Id.*

¶ 14 Rather, "[i]t is enough for first-stage purposes that the defendant has provided substantive evidentiary content showing his claims are capable of corroboration and independent verification." *Id.* ¶ 37. Evidence supporting a petition must merely " 'identify with reasonable certainty the sources, character, and *availability* of the alleged evidence supporting the petition's allegations.' " (Emphasis in original.) *Id.* ¶ 43 (quoting *Delton,* 227 Ill. 2d at 254). Therefore, "under the forgiving standards of the first stage" the Langford statement met the requirements of the Act. *Id.*

¶ 15 Thus, under *Allen,* the lack of notarization of defendant's "affidavit" does not, in and of itself, solely justify the first-stage dismissal of defendant's petition. See *Id.* ¶ 34. In the case at bar, however, the record reveals that defendant's *pro se* postconviction petition was not dismissed solely because his affidavit was not notarized. Initially, we note that defendant's "affidavit" merely states that he is innocent of all charges and that he would have insisted upon going to trial had his counsel not threatened him with "certain loss" and the "death penalty." There is no mention of defendant's desire to withdraw his plea, and, therefore, his affidavit cannot be construed as other evidence in support of his claim that he wished to withdraw his plea.

¶ 16 Although defendant claims that trial counsel stated counsel would contact defendant regarding the withdrawal of defendant's plea, defendant has provided no context or details for this allegation, no documents in support of the allegation, and no explanation for the absence of such documentation. The purpose of section 122-2 is to establish that the allegations in the petition are capable of "objective or independent corroboration," and, further, the accompanying affidavits and exhibits should identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the allegations in the petition. See *Delton*, 227 Ill. 2d at 254. Here, defendant presents this court with nothing, other than his own statement, that he told trial counsel he wanted to withdraw his guilty plea and that counsel promised to take action to accomplish this. In other words, the record does not contain any allegations capable of objective or independent corroboration. Under these circumstances, we find that defendant failed to meet the evidentiary and pleading requirements of section 122-2 of the Act, and we therefore affirm the summary dismissal of defendant's postconviction petition. See *Allen*, 2015 IL 113135, ¶ 24 (quoting *Collins*, 202 Ill. 2d at 67) (a *pro se* petition "must supply sufficient factual basis to show the allegations in the petition are 'capable of objective or independent corroboration' ").

¶ 17 Defendant next contends that his cause must be remanded for resentencing because the trial court sentenced him to an agreed term without a PSI or a specific finding on the record of his criminal history, as required by section 5-3-1 of the Unified Code (730 ILCS 5/5-3-1 (West 2008)). He claims that his sentence, which does not conform to the statutory requirement, is void, and, thus, may be challenged at any time.

¶ 18 Defendant's challenge is based on the "void sentence rule," wherein a sentence not conforming to a statutory requirement is deemed void. See *People v. Arna,* 168 Ill. 2d 107 (1995). Our supreme court, however, abolished the void sentence rule in *People v. Castleberry*,

2015 IL 116916, ¶ 19. In so doing, our supreme court reasoned that the original jurisdiction of the trial court is granted by the Illinois Constitution, not by statute. *Id.* ¶ 18. As such, a trial court's failure to comply with a statutory requirement cannot affect the court's original jurisdiction. *Id.* ¶ 15. In other words, whether a court order is void depends solely on whether the court had jurisdiction; a sentence which does not conform to a statutory requirement, but which is entered by a court with jurisdiction, is merely voidable. *Id.* ¶ ¶ 11, 15-16.

¶ 19 Therefore, pursuant to *Castleberry*, a criminal sentence cannot be considered void for lacking statutory authorization. See *People v. Cashaw*, 2016 IL App (4th) 140759, ¶ 21. Instead, presuming the court had both personal and subject-matter jurisdiction in a given case, which defendant has not challenged here, a sentence imposed erroneously by a court is merely voidable and not subject to collateral attack. *People v. Mitros*, 2016 IL App (1st) 121432, ¶ 19 (citing *Castleberry*, 2015 IL 116916, ¶¶ 11, 15) ("only the most fundamental defects, such as the lack of personal or subject-matter jurisdiction, render a judgment void").

¶ 20 Accordingly, the failure to state defendant's criminal history on the record did not divest the trial court of either personal or subject matter jurisdiction such that defendant's sentence was rendered void; rather, it is merely voidable. See *Castleberry*, 2015 IL 116916, ¶ 11. Therefore, defendant is not free to challenge his sentence for the first time on appeal and has waived the claim. See *People v. Jones*, 211 Ill. 2d 140, 148 (2004) ("a defendant may not raise an issue for the first time while the matter is on review" from the denial of postconviction relief); see also 725 ILCS 5/122-3 (West 2008).

¶ 21 Finally, defendant contends, and the State agrees, that the mittimus should be corrected to reflect a single conviction for first degree murder because there was only one victim. We agree with the parties, and therefore order, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27,

1999), that the mittimus be corrected to reflect defendant's single conviction for knowing and intentional murder (count I), the most serious charge. See *People v. Walker*, 2011 IL App (1st) 072889-B, ¶¶ 39-41.

¶ 22 For the reasons stated, we affirm the order of the circuit court of Cook County and modify the mittimus.

¶ 23 Affirmed as modified.