2018 IL App (1st) 161253-U

No. 1-16-1253

Order filed November 9, 2018

Fifth Division

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. 09 CR 472
	)	
JAMES VILLAREAL,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Summary dismissal of postconviction petition was proper where court disposed of petition within 90 days of its docketing.

¶ 2 Pursuant to a negotiated guilty plea, defendant James Villareal was convicted of two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2008)) and sentenced to two consecutive 10-year prison terms. Defendant appeals from an order summarily dismissing his *pro se* postconviction petition. He contends that the summary dismissal was improper

because, due to the clerk of the court failing to promptly docket the petition, the court did not dispose of it until 143 days after filing. For the reasons stated below, we affirm.[1]

¶ 3 Defendant was charged with various offenses allegedly committed on or about September 27, 2008. He was charged with attempted first degree murder and aggravated discharge of a firearm for allegedly shooting at Luciana Penny, Wilmona Fowler, and Keith Smith. He was also charged with attempted aggravated vehicular hijacking and attempted armed robbery for allegedly demanding a vehicle from Penny and Fowler, and demanding property from Smith, while armed with a firearm. He was charged with aggravated unlawful restraint for allegedly detaining Penny, Fowler, Smith, and Darin Macon while using a firearm. He was charged with aggravated assault for pointing a firearm at Macon knowing him to be a peace officer. He was also charged with aggravated unlawful use of a weapon.

¶ 4 Defendant pled guilty in July 2011 to two counts of aggravated discharge in exchange for consecutive 10-year prison sentences and the State nol prossing all other charges. Defendant filed *pro se* motions to withdraw his guilty plea and to reduce his sentence in December 2013, which the trial court denied in January 2014 as untimely filed. He did not appeal therefrom.

¶ 5 Defendant mailed a *pro se* postconviction petition by placing it in the "institutional mail" at his prison. The notice of filing and certificate of service reflect that the petition was mailed on October 6, 2015, to the clerk of the circuit court and the State's Attorney. The notice of filing, petition, and defendant's affidavit were notarized that day. Neither the petition nor any attachment bears any date stamp by the clerk of the court.

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 6 Except for the petition with its mailing date of October 6, 2015, the record (including the "half-sheet" of written docket entries) contains no document or entry dated between January 2014, and the summary dismissal of the petition on February 26, 2016. The court found or recited in its summary dismissal order that defendant "filed" his petition on November 30, 2015, and that the court was reviewing the petition "within 90 days of its filing."

¶ 7 On appeal, defendant raises no issue regarding the merits of his petition or the substance of the summary dismissal. Instead, he contends that the summary dismissal of his petition was improper because, due to the clerk failing to promptly docket it, the court did not dispose of it until 143 days after filing. The State responds that failure to promptly docket a postconviction petition is not reversible error.

¶ 8 A postconviction "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 by affidavit. *** The clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his or her receipt thereof and bring the same promptly to the attention of the court." 725 ILCS 5/122-1(b) (West 2014). Section 122-2.1 provides that "[w]ithin 90 days after the filing and docketing of each petition, the court shall examine such petition and" either summarily dismiss it if "the court determines the petition is frivolous or is patently without merit" (commonly called first stage review) or "order the petition to be docketed for further consideration" (commonly called second stage review). 725 ILCS 5/122-2.1(a), (b) (West 2014).

¶ 9 The requirement in section 122-2.1(a) that summary dismissal of a petition must occur within 90 days of its docketing is mandatory, and failure to do so is reversible error. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). Thus, a summary dismissal more than 90 days from

docketing must be vacated and the petition remanded to be docketed for further consideration. *Id*. For purposes of section 122-2.1(a), docketing occurs not when the clerk of the court receives the petition, nor when the clerk assigns it to the calendar of a particular judge, but rather when the clerk enters the petition into the clerk's records and sets the petition for a hearing. *Id* at 390-391.

¶ 10 This court has previously determined that a clerk's failure to promptly docket a postconviction petition pursuant to section 122-1(b) is not reversible error. *People v. Shief*, 2016 IL App (1st) 141022. In *Shief*, a defendant mailed a petition in December 2012, and the clerk of the court stamped it "received" a few days after mailing but never docketed it. The petition was not docketed until December 2013, after the defendant re-mailed it to the clerk. *Id*. ¶¶ 14-15. On appeal, the parties agreed that the clerk did not promptly docket the petition but disputed whether the statutory provision calling for prompt docketing is mandatory or merely directory. *Id*. ¶¶ 21-25. We noted that statutes issuing procedural commands to government officials are presumed to be directory unless (1) the statute specifies a consequence for noncompliance or (2) the right being protected by the command provision would be injured by a directory reading of the statute. *Id*. ¶ 27 (citing *In re M.I.*, 2013 IL 113776, ¶ 17).

¶ 11 Regarding the first point, we noted that section 122-1(b) prescribes no consequence for not promptly docketing a petition, in contrast to section 122-2.1 prescribing that a petition not summarily dismissed within 90 days must be docketed for further consideration. *Id*. ¶¶ 28-30. "The fact that section 122-2.1 prescribes a consequence for noncompliance, but section 122-1(b) does not, demonstrates that the General Assembly did not intend the same consequence – automatic advancement of the petition to the second stage – for the clerk's violation of section 122-1(b)." *Id*. ¶ 31. Also:

> "Section 122-2.1 serves as an incentive to circuit judges to swiftly adjudicate postconviction petitions by automatically advancing these cases on their dockets if the judge fails to promptly act. Section [122-1(b)], on the other hand, does not concern the actions of the circuit judge but rather those of the clerk. The remedy of automatic advancement would force the hand of the judge based on the actions of a distinct governmental official, the clerk. Circuit judges would lose control of their docket based on something entirely outside their control." *Id.* ¶ 32.

¶ 12 Turning to the second exception – the right being protected by the statutory command would be injured by a directory reading – we noted that a directory reading would have to be generally prejudicial, not just prejudicial to a particular defendant under particular circumstances. *Id.* ¶ 34 (citing *People v. Geiler*, 2016 IL 119095, ¶ 23). We "conclude[d] that the likelihood of prejudice is not so great that we must consider the prompt-docketing requirement to be mandatory under the second exception. Even if the clerk fails to docket a petition promptly, a defendant could simply refile his postconviction petition in order to have it considered." *Id.* ¶ 38. The court cannot summarily dismiss a petition as untimely at the first stage, and counsel could argue at the second stage that the untimeliness was excused by the clerk's failure to promptly docket the petition. *Id.* ¶¶ 39-40. As the *Shief* court stated, "[w]hile a delay in docketing is by no means desirable, and the clerk's delay in this case was wholly unreasonable, such a delay is not likely to preclude a defendant from having the substance of his petition heard." *Id.* ¶ 41. The court therefore concluded "that the prompt-docketing requirement of section 122-1(b) is directory, rather than mandatory." *Id.* ¶ 44.

¶ 13 Here, following *Shief*, we conclude that the prompt docketing requirement is merely directory. Thus, failure to promptly docket a petition is not reversible error; that is, this petition cannot proceed to the second stage on that basis.

¶ 14 While defendant argues that we should not follow *Shief* but instead find reversible error in the clerk's failure to promptly docket his petition, we see no reason not to follow *Shief*. We note that defendant attributes the entire time between the mailing on October 6, 2015, and summary dismissal on February 26, 2016, to the clerk's alleged failure to docket his petition promptly. He refers to "a full 143-day delay in docketing" and argues that "[t]wenty weeks is an inordinate amount of time to perform the ministerial task of docketing." Even when he acknowledges *arguendo* the possibility that his petition was docketed on November 30, 2015, consistent with the court's recitation in its summary dismissal, he argues that "almost two months to enter a document into the court records is not prompt docketing."

¶ 15 Defendant does not acknowledge that some portion of any delay was due to circumstances outside the control of the circuit court or its clerk, such as the postal service performing *its* task of carrying the petition from defendant's prison to the clerk's office. That office cannot docket a petition until it receives it. The inability to know how much of the time in question here is attributable to the clerk and how much was outside the clerk's control is another reason for us to follow *Shief* as correctly decided.

¶ 16 Defendant alternatively contends that he was deprived of "effective appellate review," because "the lack of records created by the trial court clerk's office render[s] it impossible to determine whether the petition was promptly docketed." In other words, he raises the specter that his petition was summarily dismissed more than 90 days from docketing because we cannot

determine when it was docketed. However, we note that the postconviction statutory scheme inherently envisions that a petition will in all likelihood be summarily dismissed (or proceed to the second stage) more than 90 days from when it is deemed filed by the defendant. As our supreme court has stated, "the verb 'docket' connotes more than the mere act of receiving the petition, as defendant suggests. To 'docket' requires that the cause be entered in an official record." *Brooks* at 391. Moreover, since docketing "connotes that the cause [has been] entered on the court's official docket for further proceedings" (*id.*), the petition was perforce docketed before February 26, 2016, as the court would not have acted upon the petition on that day, issuing a four-page written order, unless it was already upon its calendar. The court stated that the petition was "filed" on November 30, 2015. As the court ruled on the petition, it necessarily was docketed on or after November 30. Stated another way, we see no reason to disregard the court's statement that it disposed of the petition within 90 days as required by statute.

¶ 17 Defendant correctly points out that there is no basis in the record on appeal for the November 30 date other than the court's remark. However, we presume that the trial court acted in conformity with the law and consistently with the facts unless the record indicates otherwise. *Wackrow v. Niemi*, 231 Ill. 2d 418, 428 n.4 (2008). We will not discount the court's statement, as defendant urges us to do, merely because the record does not corroborate it.

¶ 18 Lastly, we note that defendant could have had "effective appellate review" of his *pro se* postconviction petition in this proceeding if his briefs raised any issues regarding the petition's merits. He has chosen not to do so.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.