2018 IL App (2d) 151048-U
No. 2-15-1048
Order filed February 7, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-3488
ISAIAS BELTRAN,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied the State's motion to dismiss defendant's postconviction petition as untimely filed when the delay was not due to defendant's culpable negligence; (2) at a third-stage evidentiary hearing, the trial court properly refused to consider as substantive evidence an affidavit of a defense witness where the witness was present in the courtroom and the defendant would not call the witness to testify.

¶ 2 In 2008, a Du Page County jury convicted defendant, Isaias Beltran, of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) for shooting and killing Cory Krueger. This court affirmed his conviction in *People v. Beltran*, 2-08-1062-U. Our supreme court denied defendant's petition for leave to appeal, and the Supreme Court of the United States denied his

petition for a writ of *certiorari*. Defendant then filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq* (West 2012)), asserting that his constitutional rights were violated by his trial counsel's ineffective assistance. The matter proceeded to a third-stage hearing, where the court denied the petition. Defendant appeals, arguing that the circuit court abused its discretion when it refused to consider as substantive evidence an affidavit alleging an alternate shooter. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The transcript of defendant's trial establishes the following relevant facts. Defendant and Jorge Zuno[1] were together during the early morning hours of December 19, 2007. Around 2:00 a.m., they decided to "patrol" the neighborhood in Glendale Heights where they had been spending time at the home of their mutual friend, Darryl Andrade. The pair was walking on the sidewalk when they noticed Cory Krueger walking his dog on the opposite side of the street. Zuno testified that defendant sprinted across the street and confronted Krueger. Defendant stood within two feet of Krueger, pointing a gun at his head. Krueger complied with defendant's command to empty his pockets, but defendant grew angry when he perceived that Krueger was making too much noise in carrying out the demand. Defendant fired a .22-caliber bullet into Krueger's head. Krueger fell backward onto the sidewalk. Defendant and Zuno fled the scene and returned to Andrade's home.

¶ 5 Zuno further testified that defendant convinced Andrade to drive them away from Du Page County. The group was joined by defendant's brother, Israel, as they drove off in Andrade's car. During the course of the short drive, defendant, who was seated behind the

[1]The names Jorge and George are used interchangeably for Mr. Zuno throughout the transcripts, briefs, and common law record.

driver, passed a "bundle" containing a .22-caliber revolver to Israel, who was riding in the front passenger seat. Within a few minutes, a Glendale Heights police officer observed the group and initiated a traffic stop for reasons unrelated to the shooting. Believing that the police already knew about the shooting, Zuno and Israel sprang from the right side of the car and fled on foot through the neighborhood. The .22-caliber revolver was later found in the back yard of a nearby home.

¶ 6 The officer prevented defendant and Andrade from fleeing and arrested them at the scene. Police arrested Zuno later that morning at Andrade's home. Police questioned Zuno multiple times over several days. Zuno testified that he initially lied to police, believing that he could avoid going to jail. He testified that he eventually decided to tell the truth when he realized that he was being blamed for the shooting.

¶ 7 Following the exhaustion of his appeals, defendant prepared his postconviction petition from prison. On August 16, 2012, five days prior to the filing deadline, defendant mailed a motion for an extension of time to the circuit court. Defendant alleged that the prison had been in "lockdown" for four and one-half weeks and that he had been unable to access library materials, which he needed to complete his petition. The court denied the motion, though it later admitted that it mistakenly thought defendant's petition was two years late. It is unclear when defendant received notice from the court that his motion had been denied. In any case, defendant completed his petition and mailed it on September 18, 2012.

¶ 8 The petition alleged ineffective assistance of trial counsel. In his affidavit, defendant averred that he told his attorney on the day before the start of trial that his brother, Israel, had "some very important information" about the case. He claimed that his attorney did not act on this information, and that there was a substantial probability that the outcome at trial would have

been different had Israel been called as a witness. Defendant attached Israel's affidavit to the petition as an exhibit. Israel averred that it was not defendant, but Zuno, who had passed the bundle containing the gun to him in the car, and that Zuno told him that he had shot a man earlier that morning.

¶ 9 The court advanced the petition to the second stage and appointed the public defender to represent defendant. Defendant later hired a private attorney. On December 12, 2014, defendant filed an amended postconviction petition. The court denied the State's second-stage motion to dismiss. The amended petition proceeded to a third-stage evidentiary hearing. At the hearing, defendant testified that he had told his trial counsel to contact Israel but that his attorney never acted on the information. Defendant's attorney then requested that the court admit Israel's affidavit into evidence as proof of the matters asserted therein. The court accepted the document, but only as proof that Israel said the words in front of a notary, not for its substantive truth. The court indicated that Israel would need to testify and be subjected to cross-examination before the court would consider any of the averments put forth in his affidavit for their truth. Defendant chose not call Israel to testify.

¶ 10 After listening to arguments of the parties, the court opined that, even had it accepted the contents of Israel's affidavit as substantive evidence, defendant still would have failed to demonstrate ineffective assistance by his trial counsel:

> "[Defendant] didn't, apparently, based on his testimony, he had no idea about this statement that Israel puts forth in his affidavit, and apparently would not have known about it until sometime after the trial.

> So, in essence, what I have here is [defendant] saying to [trial counsel], 'talk to my brother, he might have some important information,' without any knowledge of what it is.
>
> ***
>
> For [trial counsel] not to follow up on a vague statement about, talk to my brother, he might have some information that might lead to something else, and not doing that on the eve of the trial, in my mind, cannot be determined to be a deficient performance on the part of [trial counsel] ***."

The court denied the amended petition. Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that the court abused its discretion when it refused to accept Israel's affidavit for the truth of the matters asserted. The State first responds that defendant's petition should have been dismissed as untimely. In the alternative, the State contends that the court properly exercised its discretion in excluding the affidavit's contents as substantive truth.

¶ 13 The Act provides a method whereby a person imprisoned as a result of a criminal conviction may assert substantial denials of his or her constitutional rights in the proceedings that resulted in the conviction. 725 ILCS 5/122-1(a)(1) (West 2012). A petition brought under the Act is not an appeal from the judgment of conviction, but a collateral attack on the proceedings in the trial court. *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 14 A defendant initiates the process by filing a postconviction petition. 725 ILCS 5/121-1(b) (West 2012). A defendant must file his or her petition within six months after the conclusion of proceedings in the Supreme Court of the United States, "unless the petitioner

alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2012).

¶ 15 Postconviction proceedings consist of three stages. At the first stage, the court conducts an independent review, and dismisses any petitions that are frivolous or patently without merit, with no arguable basis in law or fact. *Tate*, 2012 IL 112214, ¶ 9. If a petition is not dismissed at the first stage, it advances to the second stage, where counsel is appointed for indigent defendants. *Tate*, 2012 IL 112214, ¶ 10. It is at the second stage where the State enters the litigation, and either answers the petition or files a motion to dismiss. *Tate*, 2012 IL 112214, ¶ 10. At the second stage, the court accepts as true all well-pleaded facts in the petition and any accompanying affidavits. *People v. Mahaffey*, 194 Ill. 2d 154, 171 (2000). If the court determines that the petition makes a "substantial showing of a constitutional violation," it proceeds to a third-stage evidentiary hearing. *Tate*, 2012 IL 112214, ¶ 10.

¶ 16 As a threshold matter, we first consider the State's contention that defendant's petition was untimely. The State raised this issue below in its motion to dismiss. We note that the State argued below that the amended petition should have been dismissed because defendant failed to show that the delay was not due to his own culpable negligence, as he was required to do pursuant to section 122-1(c). 725 ILCS 122-1(c) (West 2012). On appeal, the State again argues that the court should have sustained its motion to dismiss for an untimely filing, but now cites section 122-5, asserting that the court had no authority to extend the time for filing the original petition. 725 ILCS 122-5 (West 2012). Whether the State may bring this issue of an untimely filing on a different legal basis than it argued below, we need not address now as the State's argument fails on the merits. Our review of a second-stage motion to dismiss is *de novo*. *People v. Marino*, 397 Ill. App 3d 1030, 1033 (2010).

¶ 17 Both parties agree that defendant filed his petition 30 days after the statutory deadline had passed. The only question is whether the court properly excused the untimely filing. The State argues that the court had no authority to allow the petition to proceed pursuant to section 122-5 of the Act. That provision states in relevant part: "The court may in its discretion, *** extend[] the time of filing any pleading *other than the original pleading*." (Emphasis added.) 725 ILCS 5/122-5 (West 2012). The State posits that this provision affords the court "no discretion" and that the court "was bound to dismiss the petition as untimely."

¶ 18 As described above, section 122-1(c) places limits on the time a defendant has to file an initial postconviction petition, but it also provides that a court may excuse a defendant for a late filing if the delay was not caused by his or her culpable negligence. 725 ILCS 5/122-1(c) (West 2012). It is well-settled that courts may excuse a delay in filing a postconviction petition when the defendant is deprived of a meaningful opportunity to complete his petition as a result of a prison lockdown. *People v. Walker*, 331 Ill. App. 3d 335, 341-42 (2002); *People v. Van Hee*, 305 Ill. App. 3d 333, 337 (1999); *People v. Mitchell*, 296 Ill. App. 3d 930, 933 (1998). Defendant explained in his motion for an extension of time, which was filed before the statutory deadline, that the prison where he was housed was then in the midst of a four and one-half week lockdown. He averred that he had no access to the prison law library, which was a "major hindrance" to his efforts to complete and timely file his petition.

¶ 19 The court originally advanced the matter to the second stage after characterizing defendant's arguments as a claim of "actual innocence," which is not subject to any time limitation. See 725 ILCS 5/122-1(c) (West 2012). On the State's motion to reconsider, the court reversed itself as to its finding that the claim was one of actual innocence, but still refused to dismiss the petition. The court blamed itself for taking too long to answer defendant's motion

for an extension and responding to the motion with misinformation that might have worked to defendant's detriment:

> "I didn't respond or I didn't enter an order denying him that right until September 11th. So, in the interim time, he didn't know whether he had an extension or didn't have an extension. And when I entered the order, I then wrote him a letter. And I am looking at the letter.
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> And I say here the statutory time to file such petition has long expired. *** I was mistaken in regard to when he–how much time [he had]. I was under the impression that he was like two years late. And that obviously was not the case. He still had until August 21st to have filed a petition.
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> *** So, it would be unfair, I think, to say I am going to deny him the right to file that when I misinformed him of the time that he had, number one.
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> And number two, *** [a]s soon as he saw that I had not granted him time for the wrong reason, he did file."

The court clearly implied that defendant was not culpably negligent for the late filing. So, while we agree with the State that the court had no discretion to extend the time for filing the original petition (725, ILCS 122-5 (West 2012)), the court nonetheless acted properly pursuant to the Act when it excused the late filing because defendant was not culpably negligent for the delay (725 ILCS 122-1(c) (West 2012)).

¶ 20 We next turn to defendant's argument that the court abused its discretion when it refused to accept Israel's affidavit as substantive evidence of the truth of the matters asserted therein. While the court must accept well-pleaded facts as true in the first and second stages of a postconviction proceeding, the same is not so in the third stage, where the court is charged with

determining the actual facts. *People v. Domagala*, 2013 IL 113688, ¶ 34. The court has wide discretion in limiting the type of evidence it will accept at the hearing. *People v. Coleman*, 206 Ill. 2d 261, 278 (2002). "The court may receive proof by affidavits, depositions, oral testimony, or other evidence." 725 ILCS 5/122-6 (West 2012). It is the defendant's burden to make a substantial showing of any constitutional violations. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 21 Here, defendant offered his brother's affidavit as proof of his claim of ineffective assistance of counsel. In it, Israel stated that Zuno, not defendant, handed him the bundle containing the revolver in the car. Israel further stated that Zuno confessed to the shooting as the two fled together through the neighborhood. Israel also stated that he was never contacted by defendant's trial attorney and that he would have testified to these facts had he been called as a witness. The court indicated that it would accept the affidavit as evidence, but only for a limited purpose:

> "THE COURT: He has to be here subject to cross-examination.
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> MS. PENSON [(DEFENDANT'S ATTORNEY)]: Judge, he is here, and if the State wishes to call him as witness [*sic*], they may.
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> THE COURT: No, it's your burden, Counsel[.] If you want to call him, you call him.
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> MS. PENSON: Judge, I don't want to call him.
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> THE COURT: Okay.
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> MS. PENSON: Under the statute, however, the affidavit is admissible as proof.
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> THE COURT: I'm not going to–I'll take it as proof that he made that affidavit, but in terms of whether what he said in that affidavit is true or not, you just can't accept it at face value. It's got to be subject to cross-examination ***."

¶ 22 On appeal, defendant contends the trial court was required to accept the affidavit as substantive proof under the Act. In support, he cites *People v. Smith*, 45 Ill. 2d 91, 94 (1970), where a court accepted affidavits for the truth of the matters asserted at a postconviction hearing. Our supreme court held that the trial court properly accepted affidavits as substantive evidence, but the court also made clear that the trial court was not bound to accept the affidavits if it thought that oral testimony would be more appropriate, stating, "[I]t would not have been improper for the post-conviction judge to have required oral testimony ***." *Smith*, 45 Ill. 2d at 94. Consequently, *Smith* does not support defendant's argument.

¶ 23 Defendant cites several other cases as examples of where affidavits were accepted over live testimony. See *Sherwood v. City of Aurora*, 388 Ill. App. 3d 754, 760 (2009); see also *People v. Jarvis*, 2016 IL App (2d) 141231, ¶¶ 13-14; see also *People v. Brown*, 2014 IL App (2d) 121167, ¶ 14. These cases are all distinguishable, as none of them involved proceedings under the Post-Conviction Hearing Act. Indeed, *Sherwood* concerned a motion for summary judgment in a civil case.

¶ 24 Defendant incorrectly argues that it was illogical for the court to have taken the allegations in the affidavit as true in the earlier stages of the postconviction proceedings and not to do the same at the evidentiary hearing. As described above, the purpose of the first two stages is to determine whether a petition alleges a sufficient legal and factual basis to justify an evidentiary hearing. To that end, the court accepts well-pleaded facts as true only to determine whether it will grant an evidentiary hearing. The third-stage hearing is the fact-finding phase, similar to a bench trial, where the court weighs the sufficiency of the evidence and makes credibility determinations. *Pendleton*, 223 Ill. 2d at 473. Had he been subject to cross-examination, Israel might have had to explain why he made a statement to the police

immediately after the shooting that contradicted what he said in his affidavit. He might also have been asked to explain why he remained silent while his brother was on trial for murder when he had evidence that might exonerate him. These are credibility questions that are not answered by an affidavit alone. Thus, the court properly insisted that Israel, who was present in the courtroom, testify.

¶ 25 Moreover, defendant's own testimony at the hearing revealed that he had no knowledge of the information Israel put forth in his affidavit until sometime after the trial, which belies the notion that defendant's trial attorney was deficient at the time of trial for not following through on defendant's vague statement. The court indicated it would have denied the petition even if it had accepted the contents of the affidavit as true. Accordingly, we cannot say that the court abused its discretion when it did not accept the affidavit for the truth of all the matters asserted therein.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 28 Affirmed.