2011 IL App (1st) 090923-U
No. 1-09-0923

FOURTH DIVISION
July 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 05 C6 60799
	)	06 CR 03910
DONTE HENDERSON,	)	06 CR 01515
	)	
Defendant-Appellant.	)	The Honorable
	)	Frank G. Zelezinski
	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Salone concurred in the judgment.

ORDER

Held: The trial court properly denied defendant's postconviction petition as he failed to attach the requisite notarized verifying affidavit. Furthermore, defendant is not entitled to relief based on his argument that the charging document may not have included the term "public way" which is a necessary precursor for the automatic transfer provision.

¶ 1 Defendant Donte Henderson appeals from the trial court's order summarily dismissing his petition filed under the Post-Conviction Hearing Act (the Act) 725 ILCS 5/122-1 *et seq*. (West 2004). On appeal, he asserts that he did not receive the benefit of his bargain in his negotiated

guilty plea and that his controlled substance convictions are void because the record does not show that the State properly charged him under section 5-130(2)(a) of the Juvenile Court Act of 1987 (the Juvenile Act) (705 ILCS 405/5-130(2)(a) (West 2004)) which allows for the automatic transfer of a juvenile to adult criminal court.

¶ 2 I. BACKGROUND

¶ 3 This appeal stems from three negotiated guilty pleas entered into by defendant. Specifically, he pled guilty to delivery of a controlled substance within 1,000 feet of a school; possession of a controlled substance with intent to deliver; and aggravated battery to a correctional officer. Because the exact details of each arrest are not relevant to this appeal, only the pertinent facts will be stated below. The two controlled substance charges were tried before Judge Kenneth Wadas and the battery charges were tried before Judge Christopher Donnelly. After extensive negotiations, defendant came to a preliminary agreement with the State to enter a guilty plea on all charges in return for receiving concurrent sentences and a recommendation for boot camp. Judge Wadas accepted defendant's plea in the aggravated battery case on October 17, 2006, and imposed the agreed upon sentence of three years in prison with a recommendation for boot camp to be served concurrently with defendant's other sentences. The next day, Judge Donnelly accepted defendant's guilty pleas in the two drug cases and sentenced defendant "to four years Illinois Department of Corrections with a boot camp recommendation" for both charges and ordered the sentence to run concurrently with the three-year sentence in the aggravated battery case. Defendant did not file any post-plea motions or seek to appeal. Defendant served his entire four year sentence in prison.

¶ 4 On December 15, 2008, defendant filed a *pro se* petition for postconviction relief, in which he alleged that his guilty pleas were involuntary and that he did not receive the benefit of his bargain because he pled guilty specifically in exchange for the promise of boot camp, which he claimed he was never evaluated for. On February 9, 2009, the Honorable Frank Zelezinski summarily dismissed defendant's petition and found that his postconviction petition was untimely, frivolous and without merit.

¶ 5 Defendant appeals the lower court's decision and asks this court to grant postconviction relief based on the fact that he believed when entering his guilty plea he would be sentenced to boot camp rather than actual prison time. Defendant also raises in this appeal an issue that he admits was not raised either in the trial court or in his postconviction petition. Defendant argues that his conviction for delivery of a controlled substance within 1,000 feet of a school is void because he was 16 years old when the incident occurred and the record does not show the facts necessary for him to be tried as an adult in criminal court. 705 ILCS 405/5-130(2)(a) (West 2004). For the reasons elucidated in some detail below, we affirm the lower court's decision and find that the judgment entered was not void.

¶ 6 II. ANALYSIS

¶ 7 A. Postconviction Petition

¶ 8 The first issue we will address is whether defendant's petition for postconviction relief should proceed to second stage proceedings. Defendant argues in his appeal that his postconviction petition has set forth sufficient facts to establish a constitutional violation for purposes of invoking the Act based on a violation of due process. Defendant argues that he

agreed to plead guilty to the charges of possession of a controlled substance with intent to deliver and delivery of a controlled substance within 1,000 feet of a school in exchange for concurrent sentences of three years on the aggravated battery case and four years each on the controlled substance charges and a promise of boot camp, but did not receive the benefit of his bargain. The State responds to defendant's argument by stating that the petition did not meet the minimal pleading requirement as laid out in section 122-1(b) and section 122-2 of the Act. 725 ILCS 5/122-1(b), 122-2 (West 2004). A trial court's summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We may affirm the court's judgment on any basis found in the record. *People ex rel. Madigan v. Excavating and Lowboy Services, Inc.*, 388 Ill. App. 3d 554, 557 (2009).

¶ 9 During the first stage of postconviction proceedings, the circuit court must decide within 90 days of the filing whether the petition is "frivolous or patently without merit," when looking at every allegation the petitioner makes as true. *Hodges,* 234 Ill. 2d at 11. Postconviction relief is an entirely statutorily derived concept, so it is important that this court examine all of the language in the statute to determine that petitioner has complied with each element explicitly. Section 122-1(b) of the Act states that "[t]he 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*." (Emphasis added.) 725 ILCS 5/122-1(b) (West 2004). Section 122-2 also states in pertinent part,

> "[t]he petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained

> of, and clearly set forth the respects in which petitioner's constitutional rights were violated. *The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached*." (Emphasis added.) 725 ILCS 5/122-2 (West 2004).

¶ 10 Recently, in *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011), the trial court found that failure to comply with section 122-1 was fatal to the defendant's petition. In *Carr*, which presented facts which are quite analogous to those in this case, the defendant filed a *pro se* petition for postconviction relief pursuant to section 122-1(b) of the Act, along with an "affidavit" attesting to the truth of the petition; however, that affidavit was not notarized. The court, relying on *People v. Niezgoda*, 337 Ill. App. 3d 593 (2003), found that the absence of a notarized verifying affidavit was fatal to a postconviction petition.

¶ 11 In *Niezgoda*, the defendant filed a postconviction petition which he supported by filing four affidavits pursuant to section 122-2, none of which were notarized. *Id.* at 595. In affirming the second stage dismissal of the petition, the reviewing court relied on *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002), which established the law in Illinois as to what is required in an affidavit. The supreme court held in *Roth* that statements in writing that have not been sworn to before an authorized person cannot be considered affidavits. *Roth*, 202 Ill. 2d at 494. The court in *Niezgoda* further acknowledged *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347 (2002), which held that an affidavit filed under a specific supreme court rule was not insufficient due to a lack of notarization, but found that *Robidoux* merely presented an exception to the rule

of law provided in *Roth* and applied only to cases involving an affidavit filed pursuant to a specific supreme court rule. *Niezgoda*, 337 Ill. App. 3d at 596-97. The *Niezgoda* court further concluded that unless otherwise provided for by a specific supreme court rule or statutory authorization, an affidavit must be notarized to be valid. *Id.* at 597. Finally, the court concluded that because the Act provided no such specific affidavit requirements, an affidavit filed pursuant to the Act must be notarized to be valid. *Id.* at 597. Accordingly, the court in *Niezgoda* held that the defendant's postconviction petition was properly dismissed because the affidavits attached to the petition pursuant to section 122-2 were not notarized and thus, were not valid. *Id.* at 596-97.

¶ 12 In *Carr*, the court rejected the defendant's argument that *Niezgoda* should not be applied in his case. The defendant in *Carr* argued that there should be a distinction between the affidavit requirements that are listed in section of 122-1(b) versus 122-2 of the Act. The court found the defendant's argument tenuous because *Niezgoda* held the notarization requirement for affidavits applied to the entire Act. *Carr*, 407 Ill. App. 3d at 515. Accordingly, the court found that because the defendant's verification affidavit was not notarized, it was not valid and he was not entitled to relief. *Id.* at 516.

¶ 13 Defendant contends, however, that *Carr* was wrongly decided. Specifically, defendant argues that Carr was wrongly decided because petitioners experience difficulty in getting their affidavits notarized while in prison. He contends for the first time in his reply brief that at the time defendant's petition was filed, it was the prison's general policy to advise petitioner's to use "Affidavits of Affirmation" in lieu of notarized "proofs of service." We fail to see how this would help defendant in the instant case, as the question pertains to his verifying affidavit, rather

than a proof of service. Defendant has also never argued that he was personally advised to file a document that had not been notarized in place of the requisite affidavit. In addition, the document defendant has attached in the appendix to his reply brief is not properly before for us on appeal. *People v. Velez*, 388 Ill. App. 3d 493, 504 n.3 (2009).

¶ 14 Defendant similarly contends that *Carr* "represents a break with decades of post-conviction jurisprudence, during which courts have analyzed the summary dismissals of hundreds if not thousands of post-conviction petitions, many of which undoubtedly included unnotarized affidavits, yet never once held that lack of notarization on the verification affidavit was grounds for summary dismissal." This bold contention is not supported by reference to a single case. Instead, defendant seeks to buttress this argument by criticizing the *Carr* decision, stating that the court only cited two opinions in support of their position regarding the requirement that both section 122-1(b) and section 122-2 affidavits must be notarized. Contrary to defendant's arguments, our research reveals several opinions in which the defendant was able to have his affidavit notarized despite his presence in prison. See *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (citing *People v. Washington*, 38 Ill. 2d 446 (1967); *People v. Williams*, 47 Ill. 2d 1 (1970)). Thus, without more, we cannot agree with defendant's unsupported assumption that prisoners lack access to a notary public or that having an affidavit notarized is such a sophisticated act that it requires the assistance of legal counsel.

¶ 15 Defendant further asserts that the Code of Civil Procedure does not require a verification affidavit to be notarized to be valid, relying on section 2-1605 of the Code, which is titled "Verification of pleadings." 735 ILCS 5/2-605 (West 2006). Section 2-1605 states, in pertinent

part, that "[a]ny *pleading*, *although not required to be sworn to*, may be verified by the oath of the party filing it[.]" (Emphasis added.) 735 ILCS 5/2-605 (West 2006). What defendant fails to address is that *Roth* established that an affidavit is not a pleading. In fact, *Roth* states that a document filed with the appellate court which has not been sworn to before a person who has authority under the law to administer oaths is not an affidavit but rather takes the form of a simple pleading. *Roth*, 202 Ill. 2d at 494. Therefore, defendant's reliance on the Code of Civil Procedure regarding the verification of pleadings is misguided at best, as it does not purport to set forth the requirements of an affidavit.

¶ 16 Finally, defendant correctly argues that the threshold for surviving summary dismissal under the Act is low. It is true that the threshold for setting forth a cognizable claim under the Act is low at this stage. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Nonetheless, here, we are not affirming the decision based on the merits of the claim raised in the petition, but rather, fatal procedural deficiencies. *Carr,* 407 Ill. App. 3d at 516. Accordingly, we are unpersuaded by defendant's argument and will adhere to the well-reasoned precedent established by the *Carr* decision. When a verification affidavit is not notarized, it is neither valid nor truly an affidavit and summary dismissal is proper. *Id.* at 516.

¶ 17 In the case at hand, defendant filed a timely petition for postconviction relief, which included a verification affidavit. The affidavit was signed and dated, but it was not notarized. Therefore, based on *Carr*, defendant's petition fails.

¶ 18 B. Automatic Transfer Provision

¶ 19 Defendant next contends that his "guilty plea to delivery of a controlled substance within

1,000 feet of a school is void because that case should never have been subjected to automatic transfer to adult criminal court." The alleged incident occurred on October 12, 2004, when defendant was 16 years old. Despite defendant being a minor at the time of the arrest, the State prosecuted him in adult court under the automatic transfer provision in Section 5-130(2)(a) of the Juvenile Act. Juvenile defendants charged under the statute may be sentenced as adults if convicted of any of the predicate crimes listed in the statute. *People v. Perea*, 347 Ill. App. 3d 26, 39 (2004). The crux of defendant's argument is that in order for the automatic transfer provision to apply, the alleged offense, as charged, must take place on a "public way." Defendant argues that because neither the State nor the clerk's office can locate the actual charging document, the State cannot show that defendant was charged with being on a "public way." Defendant further argues that because the record does not otherwise show that he was charged with being on a public way, the adult criminal court had no jurisdiction over this case, ultimately making defendant's guilty plea void. Having closely read defendant's arguments however, we note defendant merely argues that the charges might not have alleged defendant was on a public way.

¶ 20 Initially, the State contends that defendant has forfeited his right to bring this argument due to the fact that it was not included in his initial petition for postconviction relief. See *People v. Jones,* 211 Ill. 2d 140, 148 (2004) (generally, the only question that can be raised on appeal from the denial of a postconviction petition is whether the allegations in the petition are sufficient to invoke relief under the Act). The State further argues that because defendant never made an issue of his age during his prosecution in criminal court, he has waived his right to be

tried as a juvenile. See *People v. Arnold*, 323 Ill. App. 3d 102, 108 (2001) (holding that defendant waived his right to be tried as a juvenile when he failed to raise age as an issue until a year after his arrest). Finally, the State argues that defendant's argument regarding the inadequacy of the charging document fails because defendant cannot demonstrate that he faced substantial prejudice by being tried in adult criminal court rather than juvenile court. Nonetheless, a void judgment may be attacked directly or collaterally in any court at any time. *People v. Spears*, 371 Ill. App. 3d 1000, 1006-07 (2007). Therefore, we must determine whether defendant can demonstrate that the judgment is void. The question of whether a judgment is void is a question of law and is therefore reviewed *de novo*. *People v. Rodriguez,* 355 Ill. App. 3d 290, 291 (2005).

¶ 21 A judgment is void, as opposed to voidable, only when the court that entered the judgment lacked jurisdiction. *Id.* A jurisdictional failure can result from the court's lack of personal jurisdiction, subject matter jurisdiction or the authority to deliver the particular sentence or judgment. *Id*. The question that applies in this case is whether the court lacked the power to render the particular judgment or sentence. *Id.*

¶ 22 Section 5-130(2)(a) of the Juvenile Act elucidates when the State can automatically transfer a juvenile prosecution to adult criminal court. Section 5-130(2)(a) states, in pertinent part, as follows:

> "The definition of a delinquent minor under section 5-120 of this Article shall not apply to any minor who at the time of the offense was at least 15 years of age and who is *charged* with an offense under Section 401 of the Illinois Controlled Substances Act, ***

> on a public way within 1,000 feet of the real property compromising any school, regardless of the time of day or the time of year. *** These *charges* and all other *charges* arising out of the same incident shall be prosecuted under the criminal laws of this State." (Emphasis added.) 705 ILCS 405/5-130(2)(a) (West 2004).

It is undisputed that a necessary factor for the automatic transfer provision to apply is that the defendant must be charged with committing an offense on a "public way."

¶ 23 In *Rodriguez*, the court held that a criminal conviction or sentence is void when the facts established at the time the court entered the judgment required a juvenile adjudication. *Rodriguez*, 355 Ill. App. 3d at 291. There, the juvenile defendant filed a motion to void a judgment after his conviction in adult criminal court based on the automatic transfer provision. Rodriguez argued that the judgment was void because he was arrested in a gas station, which based on a recent decision in *People v. Dexter*, 328 Ill. App. 3d 583 (2002), was not a "public way." This court reversed the judgment of the circuit court, stating that adult criminal court lacked the power to render the particular sentence and therefore the judgment was void. *Rodriguez,* 355 Ill. App. 3d at 291; *Dexter*, 328 Ill. App. 3d at 590. The facts of *Rodriguez,* however, are easily distinguishable from the case at hand. In *Rodriguez*, there was never an issue as to what was stated on the charging document, or where the defendant was arrested. The issue was whether a gas station was considered a "public way." Therefore, once it became clear that a gas station is in fact not a "public way," the State lost its ability to automatically transfer the case, rendering the judgment void. Defendant, on the other hand, does not affirmatively deny the charging instrument alleged he was arrested on a "public way." He simply argues that the area

where he was arrested was a private residential neighborhood and it is just as likely that he was arrested at a private residence instead of a public way, as the charging instrument is missing from our record.

¶ 24 It is generally the appellant's burden to properly complete the record on appeal. *People v. Salgado*, 263 Ill. App. 3d 238, 245 (1994). Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. *People v. Barker,* 403 Ill. App. 3d 515, 523 (2010). However, there are circumstances when this rule will be relaxed. This occurs when the defendant can prove that the incomplete record is due to no fault of his own, as well as demonstrate that there is a colorable need for the missing portion of the record in order to have appellate review. *People v. Appelgren*, 377 Ill. App. 3d 137, 142-43 (2007). If the defendant can establish both prongs, the State then must show that there are other means in order to afford adequate review. *Id.* at 142-43. In this case, due to no fault of his own, defendant's record on appeal is incomplete. Thus, the only question is whether the defendant has established a colorable need for this missing portion of the record.

¶ 25 Defendant never states that the charging document did not contain the words "public way," and that he would be able to demonstrate this if the charging instrument was included in the record. In addition, he never disputed the sufficiency of the charging instrument at trial. See *Appelgren*, 377 Ill. App. 3d at 140, 144 (where the defendant asserted on appeal that the State failed to prove him guilty beyond a reasonable doubt and had also challenged at trial the accuracy of the State's most significant piece of evidence, the defendant demonstrated a colorable need for such evidence on appeal). Rather, he merely speculates that those words might not have been

included in the charging instrument because he was arrested in a residential neighborhood. Although defendant argues that it was just as likely he was standing on a private porch or in a private yard as opposed to the city street, it follows from defendant's argument that it is just as likely that he was on a "public way" and that the charging instrument may have reflected that. Accordingly, it appears from defendant's arguments that it is equally probable that an error did not occur but that he urges us to assume that one did occur. Defendant fails to persuade this court that he has established a colorable need for the missing portion of the record where his claim of *possible* error is based entirely on speculation.

¶ 26 We are further unpersuaded by defendant's assertion that the arraignment hearing indicated the charging instrument did not allege defendant was on a public way. In particular, defendant refers to the statement made by the Assistant State's Attorney during the arraignment when informing the judge why defendant was in adult criminal court: "It's an automatic transfer case because it was a delivery within five hundred feet of a school." Defendant alleges that the Assistant State's Attorney's failure to use the term "public way" in this instance proves that the term was not used in the charging instrument. What defendant fails to address is that earlier in the arraignment, defendant waived a formal reading of the charge. Therefore, the statement made by the Assistant State's Attorney is not itself a formal reading of the charges. Despite the fact that the statement did not include all the necessary conditions for automatic transfer, it was in fact accurate and certainly did not refute any necessary condition. Finally, it is irrelevant that the factual basis for defendant's guilty plea did not state that the alleged offense occurred on a "public way," as it was not a necessary element for a conviction of delivery of a controlled

substance within 1,000 feet of a school. See 720 ILCS 570/401(c)(2) (West 2004). We find that defendant has not demonstrated that the judgment is void and accordingly, he has forfeited this issue and is not entitled to relief.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.