

SIXTH DIVISION
DECEMBER 16, 2011

No. 1-09-2792

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 16462
)	
ANTHONY FOWLER,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant filed a postconviction petition and argued on appeal that the consecutive sentences entered in exchange for his guilty plea to murder and attempted murder were void. This court agreed, but determined that defendant was not entitled to withdraw his guilty plea because his total sentence was void only as implemented. In accordance with the State's concession, defendant's sentences were ordered to run concurrently. This court further concluded that postconviction counsel satisfied the requirements of Supreme Court Rule 651(c) (eff. Dec. 1, 1984), ensuring reasonable representation and defendant failed to establish a substantial showing of constitutional deprivation meriting a third-stage evidentiary hearing. The second-stage dismissal of defendant's postconviction petition was affirmed.

¶ 2 Defendant Anthony Fowler appeals from the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). In

February 2000, defendant entered a guilty plea to attempted murder and murder, then was sentenced to 6 and 40 years' imprisonment on the respective charges, to be served consecutively. On appeal, defendant raises three alternate contentions. First, defendant contends his sentence is void because the imposition of a consecutive-term sentence violated the governing statute. He contends, as a result, that he is entitled to withdraw his guilty plea, his plea and sentence must be vacated, and the case remanded. Second, defendant contends he made a substantial constitutional showing that trial counsel was ineffective during plea proceedings and that the trial court admonished him in error regarding his sentence. He contends he is thus entitled to a third-stage evidentiary hearing under the Act. Defendant, finally, contends that his postconviction counsel failed to provide reasonable assistance in accordance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and he is entitled to remand on that basis as well.

¶ 3 Defendant was arrested, then charged with the above-stated offenses, and in February 2000, the parties participated in a Supreme Court Rule 402 (eff. July 1, 1997) conference to discuss a possible guilty plea. Following that conference, the court admonished defendant: "Murder is a Class X felony punishable by 20 to 60 years in the penitentiary, 60 to 120 years on extended term. Could get natural life." The court added that it was "[t]echnically a capital case." Defense counsel responded that defendant would have "been of age," but "I don't know if there is any qualifier." The court stated there was a dispute regarding whether it was a capital case; the State believed it was and defense counsel believed it was not. The court asked defendant if he understood, and defendant stated "yes." The court then added that defendant would be required to serve his murder sentence consecutive to his attempted murder sentence. Defendant again stated he understood.

¶ 4 The facts underlying the guilty plea revealed that on May 21, 1998, defendant and his co-defendant crouched behind bushes near a vacant lot, then stood as Christopher Solomon, age 15,

rode by on a bicycle with Deonta Pitchford, age 16, balanced on the handle bars. Defendant stated, "[w]hat's up now?" and began shooting with his silver handgun. Solomon and Pitchford jumped from the bike and ran in different directions. Solomon was shot multiple times and died as a result. Pitchford escaped unharmed. Defendant gave a handwritten statement substantially relaying these facts.

¶ 5 At the hearing, defendant stated these facts were accurate and again stated he wished to plead guilty. He stated his guilty plea was not based on threats or promises. Given the crime, and based on defendant's criminal background, age, and rehabilitation potential, the court announced that defendant would be sentenced to 40 years for murder and 6 years for attempted murder to run consecutively.

¶ 6 Defendant did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 7 In 2005, defendant filed a *pro se* postconviction petition under the Act. He alleged that trial counsel was ineffective, his plea was not entered into knowingly and voluntarily, he was deprived of his rights to equal protection and due process, his conviction was based on fabricated evidence, and he had not been given a fair trial. In a supporting affidavit, defendant stated that trial counsel essentially had forced him to plead guilty and had failed to investigate his case, including alibi witnesses.

¶ 8 The petition advanced to second-stage proceedings, and postconviction counsel was appointed in April 2006. Shortly thereafter, counsel wrote defendant a letter stating that he had received defendant's correspondence and was considering defendant's postconviction petition, but had not yet obtained the guilty plea transcript. Counsel requested that defendant specify why his plea was involuntary.

¶ 9 In a letter dated July 2007, which was addressed to postconviction counsel, defendant emphasized that his plea was not voluntary and trial counsel ineffective. He stated, "[m]oreover

the attempt murder victim was never physically harmed and therefore the consecutive six years sentence is illegal, null and void." Defendant stated he wished to achieve the withdrawal of his guilty plea and "by all means the dismissal of the attempt murder sentence."

¶ 10 On February 14, 2008, defendant filed an amended *pro se* supplemental petition claiming, *inter alia*, that his consecutive sentence was "illegal" because "[n]o severe bodily injury or injury of any type was inflicted upon the alleged attempt[ed] murder victim," and in support, cited the supreme court case, *People v. Whitney*, 188 Ill. 2d 91, 100 (1999). Defendant alleged that counsel was therefore ineffective for advising defendant to plead guilty to an illegal sentence. He further alleged his due process rights were violated, and his plea not entered into knowingly and voluntarily, because the court admonished him that he was subject to consecutive sentences. Defendant stated that since the appointment of postconviction counsel, he had written counsel numerous times requesting copies of the plea agreement and consultation with counsel, and the filing of an amended petition, all to no avail. Counsel did not respond. Defendant stated that he therefore had "been forced" to seek assistance elsewhere from an inmate paralegal to aid in filing the amended petition.

¶ 11 A year later, in April 2009, counsel filed a supplemental petition together with a Rule 651(c) (eff. Dec. 1, 1984) certificate stating that he had consulted with defendant by mail to ascertain his claims of constitutional deprivation, examined the record, and although defendant's *pro se* "petition adequately present[ed] his claims of constitutional deprivation," counsel filed the supplemental petition. Counsel stated the supplemental petition merely "augmented" defendant's previously-filed petition and affidavits, and he requested that the court refer to the earlier pleadings. In the supplemental petition, counsel reiterated defendant's principal claims were that trial counsel was ineffective and defendant's plea was not knowing or voluntary. Attached was the guilty plea hearing transcript and an affidavit by defendant in which defendant verified that

he was raising an ineffective assistance of counsel claim.

¶ 12 The State filed a motion to dismiss defendant's petition for lack of timeliness and for failing to establish a substantial showing of a constitutional deprivation. The court granted the motion. This appeal followed.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). At the second stage of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). All well-pleaded facts not positively rebutted by the trial record are taken as true. *Id.* Our review of the circuit court's dismissal of defendant's petition on the State's motion is *de novo*. *Id.* at 473.

¶ 14 Defendant first contends that his consecutive-term sentence is void because under section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 1998)) his sentences for attempted murder and murder were required to run concurrently. A void sentence may be challenged at any time, even in the context of postconviction proceedings. See e.g., *Petrenko*, 237 Ill. 2d at 503. The State concedes, and we agree, that the consecutive-term sentence as implemented in this case was improper.

¶ 15 Generally, Illinois law prohibits consecutive sentences for multiple offenses by a defendant committed in a single course of conduct during which there was no substantial change in the nature of the criminal objective; in such a case, sentences must run concurrently. 730 ILCS 5/5-8-4(a) (West 1998); *People v. Causey*, 341 Ill. App. 3d 759, 771 (2003). An exception exists for certain triggering offenses. *Causey*, 341 Ill. App. 3d at 771. For example, where a defendant is convicted of a Class X or Class 1 felony, and the defendant inflicted severe

bodily injury during the commission of that felony, consecutive sentences are required. *Causey*, 341 Ill. App. 3d at 771-72.

¶ 16 In this case, defendant was found guilty of attempted murder, a Class X offense (720 ILCS 5/8-4 (West 1998)), and murder (720 ILCS 5/9-1 (West 1998)). The record does not disclose that the attempted murder was accompanied by severe bodily injury, which would have triggered the consecutive-sentencing exception, and the court did not find a consecutive sentence was warranted to protect the public. Defendant's 40-year sentence for murder and 6-year sentence for attempted murder, then, were required to run concurrently. See *People v. Whitney*, 188 Ill. 2d 91, 100 (1999).

¶ 17 Defendant argues that this renders both his sentence and guilty plea void, thus requiring remand. The State responds that this renders only the consecutive nature of defendant's sentence void, but that defendant's guilty plea otherwise remains intact. The State argues that this court may modify the sentences so that they run concurrently and that the case need not be remanded. The State emphasizes that the sentence, as corrected, conforms to the statutory range.

¶ 18 In his reply brief, defendant cites the supreme court's recently-decided case *People v. White*, 2011 IL 109616, to support his contention that his guilty plea is void and requires remand. In *White*, the defendant entered a negotiated guilty plea to murder with a firearm and possession of contraband while in a penal institution in exchange for consecutive 28-year and 4-year sentences on the respective charges. *White*, 2011 109616, ¶¶ 4-7. Defendant unsuccessfully attempted to withdraw his guilty plea, arguing he was not properly admonished of a 15-year firearm enhancement, which made the sentencing range 35 to 75 years, not 20 to 60 years. *Id.* at ¶¶ 9, 11. He argued that his 28-year sentence was below the minimum authorized by statute and therefore void. *Id.* at ¶ 9. The appellate court agreed with defendant, and the State appealed to the supreme court. *Id.* at ¶¶ 12, 15.

¶ 19 The court in *White* affirmed the appellate court. *White* held that a trial court does not have authority to impose a sentence that does not conform to statutory guidelines, and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates. *Id.* at ¶ 20. In such a case, *White* stated, the defendant's sentence is illegal and void. *Id.* *White* noted that the firearm enhancement was mandatory in that case and, as a result, determined that the defendant's 28-year sentence did not conform to the minimum statutory requirement of 35 years and was void. *Id.* at ¶¶ 19, 21. The court held that this made the entire plea agreement void, as well. *Id.* at ¶ 21.

¶ 20 We conclude that this case is distinguishable from *White*. In *White*, the defendant pleaded guilty in exchange for a sentence that, in its entirety, was statutorily impossible; it could not be modified or corrected on appeal or upon remand for resentencing to satisfy the statute and also approximate the bargain struck by the parties. As a remedy, then, the court was required to vacate not just the void sentence, but the entire plea entered in reliance on that void sentence.

¶ 21 In *People v. Donelson*, 2011 IL App (1st) 092594, this court recognized an exception to *White's* remedy of requiring withdrawal of both the guilty plea and sentence when the sentence is void. In *Donelson*, the defendant pleaded guilty to murder, home invasion, and aggravated criminal sexual assault in exchange for concurrent sentences of 50, 30, and 30 years on the respective charges. *Donelson*, 2011 IL App (1st) 092594, ¶¶ 3-4. On collateral appeal, defendant argued that under section 5-8-4 (730 ILCS 5/5-8-4(a) (West 1998)), the trial court should have imposed consecutive sentences for defendant's convictions of murder and aggravated criminal sexual assault. *Id.* at ¶ 7. He argued the imposition of concurrent, rather than consecutive, sentences made his plea and sentence void requiring that both be vacated. *Id.* at ¶ 7.

¶ 22 This court determined that only the sentence was void. *Id.* at ¶ 9, 13. *Donelson* first

noted the principle that a plea agreement is void only when an essential part of the agreed exchange is unenforceable or illegal under the relevant statutes. *Id.* at ¶ 14. The court concluded the essential terms of the plea agreement were the charges to which the defendant pleaded guilty and the total prison sentence for the offenses, both of which were consistent with the statutes at issue. *Id.* at 14, 18. Thus, *Donelson* determined that while the plea agreement as a whole remained intact, the "sentence imposed in implementation of that agreement was void." *Id.* ¶ 19. *Donelson* reasoned that the "[d]efendant does not have the right to withdraw his plea, as this would be contrary to the State's right to the benefit of the parties' bargain." *Id.* ¶ 19. The court determined that the appropriate remedy in that case was to remand for resentencing to reapportion the sentences on the three charges; it was possible for the murder and aggravated battery sentences to run consecutively while maintaining the original prison sentence of 50 years. *Id.* ¶ 18-19.

¶ 23 In this case, as in *Donelson*, only the sentence as implemented is void. Defendant pleaded guilty to murder in exchange for a 40-year sentence and attempted murder in exchange for a 6-year sentence for a total of 46 years. The charges and the respective sentences imposed thereon, which were the essential terms of the plea agreement, are consistent with the controlling statutes. See 730 ILCS 5/5-8-1(a)(1)(a), (a)(3) (West 1998)) (sentencing range for murder, 20 to 60 years, and for attempted murder, 6 to 30 years). The essential terms of the plea agreement, or the promise upon which defendant relied when pleading guilty, can still be fulfilled. As a result, neither the guilty plea nor the total sentence of 46 years is void; the sentence corresponding to each charge may be corrected upon remand to reflect a total of 46 years and also run concurrently. In this case, however, we need not remand the cause for resentencing because the State concedes that defendant's sentences should run concurrently for a total of 40 years' imprisonment. In light of the State's concession and because this court maintains authority to

correct a void sentence at any time (see *People v. Jones*, 168 Ill. 2d 367, 378 (1995); *People v. Arna*, 168 Ill. 2d 107, 113 (1995)), we order the 40-year and 6-year sentences to run concurrently. Defendant's total sentence is 40 years.

¶ 24 Defendant next contends his petition set forth a substantial showing of a constitutional violation that his trial counsel was ineffective for failing to challenge the imposition of consecutive-term sentences, advising him that he was eligible for a death sentence, and essentially coercing his guilty plea. Defendant contends his plea was not entered into voluntarily and knowingly. He further contends he made a substantial showing that his due process rights were violated where the trial court admonished him in error that he was subject to consecutive sentences and also that he was subject to the death penalty.

¶ 25 The State argues, initially, that defendant waived his claims by failing to raise them on direct appeal. Defendant responds that constitutional claims cannot be procedurally defaulted when a direct appeal is not filed.

¶ 26 The supreme court has stated that an involuntary guilty plea claim may be raised for the first time in a postconviction petition, even absent the filing of a motion to withdraw the guilty plea or a direct appeal. *People v. Stroud*, 208 Ill. 2d 398, 403 (2004). Here, defendant's constitutional claims center on whether his plea was voluntary and knowing. Although he did not file a motion to withdraw his guilty plea or a direct appeal, in light of *Stroud*, we conclude the State's waiver argument does not apply.

¶ 27 The State next argues that defendant's petition was properly dismissed because it was untimely filed and defendant did not allege a lack of culpable negligence for the untimely filing.

¶ 28 Indeed, if a postconviction petition is not filed within the limitations period, the Act requires the defendant to allege facts showing the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (1998). Absent such allegations, the Act directs the trial court to dismiss

the petition as untimely at the second stage on the State's motion. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007).

¶ 29 In this case, defendant had three years from his 2000 conviction to file his postconviction petition. See 725 ILCS 5/122-1(c) (1998). Defendant filed his postconviction petition in 2005. Defendant's petition therefore was not timely filed. Defendant did not present facts establishing a lack of culpable negligence in the late filing. As stated, this generally necessitates dismissal of the petition.

¶ 30 Defendant, however, contends dismissal on that basis would be improper where postconviction counsel "made no effort to supplement [defendant's] petition with facts that would support a lack of culpable negligence."

¶ 31 At second-stage postconviction proceedings under the Act, a defendant is entitled only to a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42. To ensure such assistance, Rule 651(c) requires that postconviction counsel: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. *Id.* Rule 651(c) requires a showing that counsel took necessary steps to secure adequate representation of defendant's claims. *Id.* at 44. To that end, the supreme court has held that the "amendments" requirement encompasses a duty to allege any facts that may establish a lack of culpable negligence. *Id.* at 43.

¶ 32 The precedent established in *Perkins* controls this case. There, the supreme court held that the defendant's postconviction counsel did not provide unreasonable representation where there was nothing in the record to indicate that the defendant had "any other excuse showing the delay in filing was not due to his culpable negligence." *Perkins*, 229 Ill. 2d at 51, 53. In *Perkins*, counsel filed a Rule 651(c) certificate and thus officially represented that the duties

stated therein had been fulfilled. *Id.* at 50. The supreme court reiterated the principle that counsel is presumed to know the law and, given the State's recitation of the timeliness requirement both in its motion to dismiss and at the sentencing hearing, the court stated it was "difficult to believe counsel was unaware of the applicable legal standards." *Id.* at 51. The court, moreover, noted that counsel effectively argued the delay was not due to the defendant's culpable negligence by stating that the issue was only ripe for review after the appellate court's disposition. *Id.*

¶ 33 Here, as in *Perkins*, postconviction counsel filed a Rule 651(c) certificate officially representing to the court that had fulfilled the duties stated therein. This gives rise to a presumption that counsel provided reasonable assistance during second-stage proceedings under the Act. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. As in *Perkins*, nothing in the record indicates that defendant had any other excuse showing the delay in filing was not due to his culpable negligence.

¶ 34 Defendant argues the record rebuts the presumption that counsel complied with Rule 651(c) and essentially claims we therefore cannot assume that there was no excuse for the untimely filing of the petition. Defendant, for example, points to his *pro se* supplemental petition expressing counsel's failed communications. He also points to counsel's failure to amend his petition to include the voidness claim, arguing that had counsel reviewed the record, he would have raised that issue.

¶ 35 We disagree with defendant's assertions. The record shows that shortly after his appointment, postconviction counsel wrote defendant a letter stating that he had received defendant's correspondence and was considering defendant's petition. Counsel appeared at various status hearings on defendant's behalf and stated that he had read the transcript and communicated with defendant. Ultimately, counsel filed a supplemental petition along with his

Rule 651(c) certificate. Attached to the supplemental petition was the guilty plea transcript and defendant's signed and sworn affidavit attesting that trial counsel was ineffective. At the hearing on defendant's petition, counsel reiterated that trial counsel was ineffective for failing to investigate defendant's case and also for coercing his guilty plea, and that defendant's plea therefore was not voluntary. This record demonstrates that counsel's representation of defendant was reasonable.

¶ 36 Defendant makes much of the fact that postconviction counsel failed to mention his void sentence claim. While it would have been preferable for counsel to emphasize the sentencing issue before the court, counsel's failure to do so did not render his representation on defendant's constitutional claims unreasonable. The voidness issue was fully before the court in defendant's supplemental *pro se* petition. Counsel's supplemental petition clearly did not supercede defendant's earlier pleadings and, moreover, it presented the transcript of the plea hearing to the court.

¶ 37 Based on the foregoing, we agree with the State that defendant's petition was untimely. Defendant did not present facts establishing a lack of culpable negligence for the late filing. Defendant's petition was properly dismissed at second-stage postconviction proceedings.

¶ 38 We note, finally, that this procedural bar aside, defendant's petition does not establish a substantial showing of constitutional deprivation. Defendant claimed trial counsel was constitutionally ineffective, and his plea involuntary, because counsel coerced defendant into pleading guilty and in error informed him that he would face a death sentence. Whether defendant met the statutory requirements for a death sentence is unclear from the transcript. At the hearing, according to the court, the State argued he did, but defense counsel argued he did not. The factual dispute was not resolved. Regardless, the transcript rebuts defendant's claim that counsel advised defendant he would face a death sentence. Defendant does not support his

coercion claim with adequate facts, only conclusory statements, and nothing in the record indicates that he would have persisted to trial or that he maintained a plausible defense, as is required. See *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005). Defendant's ineffective assistance claim fails.

¶ 39 Defendant's claim that he was prejudiced by the trial court's admonishment regarding his maximum sentence also has no merit. Reversal for an improper Rule 402 admonishment depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment. See *People v. Sharifpour*, 402 Ill. App. 3d 100, 114 (2010). If the record shows that a guilty plea was voluntary and not the result of any force, threats, or promises, then any failure to strictly comply with Rule 402 is harmless. *Id.* In this case, the court admonished defendant that he could be death eligible, but also said that point was in dispute. Defendant knew the term of years he faced on each count and that it was disputed regarding whether he was death eligible, yet he still chose to plead guilty rather than face trial. The record indicates that his plea was voluntary and not coerced. Defendant has not shown that real justice was denied.

¶ 40 Lastly, we note that any contention that counsel was ineffective for failing to contest the court's imposition of consecutive sentences or that the court's admonishment resulted in prejudice has been rendered moot by our disposition stated above.

¶ 41 The judgment of the circuit court of Cook County dismissing defendant's postconviction petition on the State's motion therefore is affirmed. We order the clerk of the circuit court to correct the mittimus to reflect concurrent, rather than, consecutive sentences, for a total sentence of 40 years.

¶ 42 Affirmed; mittimus corrected.