

Third Division
December 19, 2012

No. 1-10-3606

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	92 CR 11885 (02)
)	
DEMETRIUS COGWELL,)	Honorable
)	Domenica A. Stephenson,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Steele and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Petitioner's *pro se* post-conviction petition was properly dismissed without an evidentiary hearing because it was untimely.

¶ 2 Petitioner, Demetrius Cogwell, appeals from the dismissal of his post-conviction petition without an evidentiary hearing. For the following reasons, we affirm.

¶ 3 On May 4, 1995, Demetrius Cogwell was convicted of first-degree murder for the 1992 murder of Marlon Genus. Cogwell was also convicted of concealment of homicidal

death. Cogwell was sentenced to 55 years and 5 years' imprisonment on those charges, respectively.

¶ 4 One of the State's witnesses at Cogwell's trial was Mitchell Loup. Loup and Cogwell shared a cell while awaiting resolution of their respective cases; Loup was under arrest for a charge of residential burglary at the time. Loup's case was being handled by the same prosecutor trying Cogwell's case. At Cogwell's trial, Loup testified that Cogwell had made incriminating statements to him while the two were housed together. Both Loup, who was questioned on the matter at Cogwell's trial, and the prosecutor handling the cases denied that Loup expected or was promised any favorable treatment in exchanged for his testimony against Cogwell. The day after testifying in Cogwell's case, Loup pleaded guilty to a reduced charge of attempt residential burglary and received a sentence of five years, below the mandatory minimum of six years.

¶ 5 On direct appeal, Cogwell argued the evidence against him was insufficient to sustain the conviction and that his sentence was improper. On December 6, 1996, this court upheld the trial court on both claims. On December 19, 2003, Cogwell filed a *pro se* post-conviction petition¹, alleging that (1) he was denied his constitutional right to counsel at a post-indictment conference with Loup, and (2) his appellate counsel was ineffective for

¹ At some point Cogwell also filed a petition for *habeas corpus* relief with the United States District Court for the Northern District of Illinois. That petition was denied on January 16, 2004.

raising on direct appeal that the State failed to disclose the consideration Loup received in exchange for his testimony against Cogwell.

¶ 6 Cogwell's *pro se* post-conviction petition was dismissed as frivolous on July 13, 2004. On December 16, 2005, this court reversed the dismissal, holding that the summary dismissal of the post-conviction petition after more than 90 days was error.

¶ 7 On remand, Cogwell filed an amended post-conviction petition with the assistance of counsel. Cogwell raised the same claims he raised in his *pro se* petition. He also alleged that his trial counsel was ineffective for failing to call several alibi witnesses who would have testified that Cogwell was at a family member's home at the time of Genus' murder. The State moved to dismiss the amended petition. The trial court granted the dismissal, finding that Cogwell's original *pro se* petition was untimely. This appeal follows.

¶ 8 The Post-Conviction Hearing Act (the Act) is a means by which defendants can challenge their convictions or sentences for violations of either federal or state constitutional law. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The purpose of post-conviction proceedings is to address constitutional issues that were not, nor could have been, determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). To be entitled to post-conviction relief, a petitioner must show a substantial deprivation of his or her constitutional rights in the proceedings that resulted in the challenged conviction or sentence. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

¶ 9 There are three states of post-conviction proceedings in non-capital cases. *Id.* at 471-72. At the first stage, the court may summarily dismiss the petition if it finds the petition to

be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). The State does not have an opportunity to raise any arguments during this stage. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). The trial court does not determine whether the petition has complied with procedural rules at this stage; the court only evaluates the merits of the petitioner's claim to determine whether the allegations in the petition, liberally construed and taken as true, present the "gist of a constitutional claim." *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 10 At the second stage, the State must either answer the petition or move to dismiss. 725 ILCS 5/122-5 (West 2010). At this stage, the court must determine if the petition, together with any accompanying documentation, makes a substantial showing of a violation of petitioner's constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Only if such a showing is made does the petition proceed to the third stage, which is an evidentiary hearing based on the merits of the petition. *Id.*; 725 ILCS 5/122-6 (West 2010).

¶ 11 Section 122-1(c) of the Act establishes a statute of limitations for filing post-conviction petitions. 725 ILCS 5/122-1(c) (West 2010).² If the petitioner can show that the

² Since petitioner's 1995 conviction, this statute has undergone several revisions by our legislature. Generally, the statute of limitations outlined in this provision applies retroactively. See *People v. Bates*, 124 Ill. 2d 81, 84-86 (1988). Furthermore, Cogwell's petition would have been deemed untimely under any of the applicable variations of the statute. Therefore, we will refer to the most recent version of the statute.

late filing was not due to his or her culpable negligence, the statute of limitations does not apply. *Id.* The State may raise the issue of petitioner's culpable negligence as an affirmative defense during the second stage of post-conviction proceedings. *Bocclair*, 202 Ill. 2d at 101.

¶ 12 In the court below, the State moved to dismiss Cogwell's petition because it was filed after the statute of limitations had lapsed. Cogwell argued that the delay was not due to his culpable negligence. After reviewing the evidence Cogwell presented, the court determined that he was culpably negligent and dismissed the petition without an evidentiary hearing.

¶ 13 Cogwell argues on appeal that the dismissal of his petition for untimeliness at the second stage was error. Rather, he claims, culpable negligence should be determined at a third-stage evidentiary hearing. In support of this argument, Cogwell relies heavily on *People v. Wheeler*, 392 Ill. App. 3d 303 (2009). In *Wheeler* this court stated:

“[W]hen a trial court determines whether or not a defendant was culpably negligent, the trial court must assess the defendant's credibility. *Bocclair*, 202 Ill. 2d at 102. Such an assessment is not intended for a second-stage dismissal hearing, where a trial court is foreclosed from fact finding and all well-pleaded facts are taken as true. *Coleman*, 183 Ill. 2d at 380-81. Assessments of credibility are better suited to a third-stage evidentiary hearing ***.” *Wheeler*, 392 Ill. App. 3d at 310.

¶ 14 *Wheeler* relies on *Bocclair* and *Coleman* for his conclusion. Yet neither of those cases explicitly dealt with the specific question of whether a trial court could rule on a petitioner's culpable negligence at the second stage. In *Bocclair*, the three defendants each filed untimely

post-conviction petitions, and all three petitioners were dismissed at the first stage of proceedings. Those dismissals were upheld by the appellate court. Our supreme court granted leave to appeal to determine whether post-conviction petitions can be dismissed at the first stage for untimeliness. *Bocclair*, 202 Ill. 2d at 94. Engaging in a review of the statutory language of section 122-2.(a)(2) of the Act, which governs summary dismissals of post-conviction petitions, the court in *Bocclair* determined that section only allowed for summary dismissals if the petition was frivolous or patently without merit. *Id.* at 99-102. The court went on to say that “the matter of untimeliness should be left for the State to assert during the second stage of the post-conviction proceedings.” *Id.* at 102. The *Bocclair* court did not explicitly determine whether the trial court could then rule on the matter of untimeliness at the second stage, only that the issue of untimeliness could not be raised until the second stage.

¶ 15 *Coleman* is even less applicable to the issue of timeliness. In *Coleman*, the petitioner raised several substantive claims in his post-conviction petition, which was dismissed by the trial court at the second stage. The petitioner there argued that the trial court erred because he was entitled to a third-stage evidentiary hearing on the merits of his claim. He maintained, and the court conceded, that at the second stage, the trial court must take all well-pleaded facts in the post-conviction petition and affidavits as true. *Coleman*, 183 Ill. 2d at 380-81. While the *Wheeler* court applies the language to the issue of timeliness, in *Coleman* the court was addressing only the procedures for evaluating a post-conviction petition on the merits of its substantive claims.

¶ 16 Neither of these cases is particularly instructive. We find *People v. Lander*, 215 Ill. 2d 577 (2005) far more helpful. In *Lander*, the petition appealed the dismissal of his untimely post-conviction petition at the second stage. The petitioner alleged on appeal that he pleaded facts sufficient to establish that his delay in filing was not due to his culpable negligence. While cautioning that its examination of the circumstances surrounding Lander's delay was fact-specific, the court ultimately decided that Lander had not pleaded facts sufficient to show a lack of culpable negligence in filing an untimely petition. *People v. Lander*, 215 Ill. 2d 577, 586-88 (2005). The court upheld the trial court's dismissal of Lander's petition and, in doing so, impliedly held that untimely petitions may be dismissed at the second stage.

¶ 17 Cogwell, relying on *Wheeler*, seems to argue that one is entitled to an evidentiary hearing based solely on the existence of well-pleaded facts in the petition and affidavits, with no regard to the *sufficiency* of those allegations. Allowing petitioners to be automatically entitle to a third-stage evidentiary hearing simply by alleging a lack of culpable negligence in filing untimely post-conviction petitions would drastically upset the current system of post-conviction review. First, such a rule would be at odds with established law which permits post-conviction petitions to be dismissed on their merits at the second stage if such petitions do not plead facts sufficient to establish a claim of a constitutional violation of petitioner's rights. In addition, such a rule would create a perverse incentive for petitioners to file untimely petitions in order to bypass the mechanisms for dismissal established by the Act. We cannot support such a rule, and to the extent *Wheeler* does so, we disagree with that

case.

¶ 18 We choose instead to follow the *Lander* model. *Lander* instructed that we review post-conviction petitions dismissed at the second stage under a *de novo* standard of review. *Lander*, 215 Ill. 2d at 586.

¶ 19 Section 122-1(c) of the Act dictates that post-conviction petitions must be brought within six months after the resolution of the petitioner's federal *habeas* relief petition, or within six months of the deadline for filing a federal *habeas* petition. 725 ILCS 5/122-1(c) (West 2010). Petitions for federal *habeas* relief must be filed within one year of the conclusion of the direct review of petitioner's conviction and sentence. 28 U.S.C. § 2244(d)(1) (2010). While it is clear that Cogwell filed an appeal to the appellate court, the only record of an appeal to our supreme court is in the 2004 opinion in the United States District Court dismissing Cogwell's *habeas* petition. *U.S. ex rel. Cogwell v. Illinois*, 2004 WL 783095, at *2 (N.D. Ill. 2004). Cogwell claimed his appeal to our supreme court was denied in February 2001. The Northern District cast doubt on this claim, suggesting that our supreme court denied leave "well before that." *Id.* But the court did not specify when the appeal was actually denied, and went on to assume that February 2001 was the correct trigger date for the purposes of its opinion. *Id.* Assuming, as the Northern District did, that the clock began to run in February 2001, Cogwell had until February 2002 to file his *habeas* petition and until August 2002 to file his petition for post-conviction relief with the trial

court.³ 28 U.S.C. § 2244(d)(1); 725 ILCS 5/122-1(c). Cogwell did not file his petition until December 2003.

¶ 20 Culpable negligence is higher than ordinary negligence and is akin to recklessness. *Bocclair*, 202 Ill. 2d at 108. Cogwell argues that he was not culpably negligent in filing his post-conviction petition almost six years after the deadline for two reasons: (1) he suffers from mental illness and (2) the prisons at which he was incarcerated were under “lock down,” preventing him from accessing the resources necessary to file a petition. Cogwell included with his petition an affidavit and medical records showing that since being incarcerated, he was diagnosed with a mental illness and has been treated with various medications. Cogwell’s affidavit states that the medication he was initially prescribed cause him to be “spaced out,” but notes that he was taken off that medication sometime in 1998 or 1999. While he further avers that he is still suffering from mental illness and is now being

³ The trial court in the instant matter found that petitioner did not seek leave to appeal. In the absence of a direct appeal, a petition for post-conviction relief must be filed within three years of the date of the petitioner’s conviction. 725 ILCS 5/122-1(c) (West 2010). Under that scenario, Cogwell would have had until May 4, 1998, to file his post-conviction petition. Cogwell does not argue in his brief that he filed an appeal to our supreme court. Nevertheless, for purposes of our discussion, we will analyze Cogwell’s claim under the findings most favorable to him - that an appeal to our supreme court was filed and denied sometime in February 2001.

treated with different medication, he makes no claims that his current medication, or even the underlying illness, impaired his ability to file his petition. Rather, he seems to suggest that the mere fact that he was suffering from a mental illness automatically establishes a lack of culpable negligence. He cites no authority for this proposition, and we are not inclined to adopt such a rule in the absence of persuasive authority.

¶ 21 Cogwell also avers that he was not culpably negligent because there were periods during his incarceration in which the facility where he was housed was under lock down. During lock downs, Cogwell claims he was denied access to the library and to other privileges that would have enabled the filing of his petition. Cogwell has been housed at two facilities (excluding hospitals for treatment of his mental illness) since his conviction. He claims that the first facility, where he served from July 1995 to April 1997, was “always” under lock down. He claims that the second facility was under lock down about 50% of the time. Yet, the records from the correctional facilities do not indicate that any lock downs were imposed at any time after February 2000. To the extent that Cogwell was prevented by the institution from accessing the resources necessary to file his post-conviction petition, it does not appear that he was affected by the lock downs during the relevant time period – from February 2001 to August 2002.

¶ 22 Assuming the truth of all facts Cogwell has pleaded, we cannot say that his allegations demonstrated a sufficient lack of culpable negligence to excuse the delay in filing his post-conviction petition. There are no facts to show that either his mental illness or the lock downs of the prisons prevented him from filing a timely post-conviction petition.

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Therefore, we find the trial court did not err in dismissing his petition at the second stage of proceedings. For this reason, we need not discuss the merits of the underlying petition. The decision of the trial court is affirmed.

¶ 23 Affirmed.