2014 IL App (1st) 120365-U

FIFTH DIVISION
March 28, 2014

No. 1-12-0365

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 08 CR 5721
	)	
WARDELL WATKINS,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justice McBride concurred in the judgment.
Presiding Justice Gordon concurred in part and dissented in part.

ORDER

¶1 ***Held***: The dismissal of defendant's *pro se* post-conviction petition was affirmed where defendant's claim of ineffective assistance of counsel for failure to call a witness at defendant's trial could have been raised on direct appeal and where defendant did not attach to his petition an affidavit from that witness or explain his failure to do so.

¶2 Defendant, Wardell Watkins, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010). Defendant claims that his petition set forth the gist of a meritorious claim that his

constitutional rights were violated due to the ineffective assistance of trial counsel where counsel failed to investigate and call a witness at defendant's trial. He also claims that the length of his mandatory supervised release (MSR) term should be shortened from three years to two. For the reasons that follow, we affirm.

¶3 In April of 2009, defendant was found guilty of one count of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a) (West 2008). The evidence supporting that conviction showed that, on or around March 8, 2008, defendant ran a stop sign, drove away from the officers who curbed him, led the police on a car chase, crashed into a parked car and a fire hydrant, ran from the scene and dropped a loaded handgun before being apprehended. The evidence also showed that defendant had previously been convicted of armed robbery. Following his conviction, defendant was sentenced as a Class X offender to 22 years' imprisonment and to a 3-year MSR term.

¶4 When defendant filed a direct appeal asserting only that his sentence was excessive, his conviction and sentence were affirmed. See *People v. Watkins*, No 1-09-1456 (2010) (unpublished order under Supreme Court Rule 23).

¶5 Defendant subsequently filed a *pro se* post-conviction petition claiming that his trial counsel was ineffective for failing to: (1) investigate and introduce into evidence the 911 transcripts related to his arrest; (2) have the gun that he allegedly dropped fingerprinted; and (3) investigate and call a police officer who allegedly approached defendant after his arrest and asked him whose gun was in the front seat of the car. Defendant attached to his petition his own affidavit stating that, on the day he was arrested, a Latino officer asked him "[w]ho's [*sic*] gun is that in the front sit [*sic*] of the car," and that he told his attorney about this conversation and to call this officer as a witness at trial but that counsel did not do so. The circuit court dismissed

defendant's petition as frivolous and patently without merit. This appeal followed.

¶6 Before we address defendant's claims on appeal, we consider the State's challenge to our jurisdiction. The State claims that this court lacks jurisdiction to consider defendant's appeal because defendant did not file his notice of appeal within 30 days of the order dismissing defendant's petition. Defendant responds that his notice of appeal was timely filed because it was placed in the prison mail system within 30 days of the order dismissing his petition. We agree with defendant.

¶7 Under Rule 373, if a mailed notice of appeal is received after the due date (thirty days from the date of order appealed from), the time of mailing is deemed the time of filing so long as the proof of mailing is as provided in Rule 12(b)(3). Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). Rule 12(b)(3) provides that in the case of service by mail, service is proven by an affidavit of the person who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid. Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

¶8 In this case, defendant's petition was dismissed on November 30, 2011. Defendant's notice of appeal was stamped "RECEIVED" by clerk of the Circuit Court of Cook County on January 5, 2012, which is more than 30 days after the date of the order dismissing defendant's petition. However, the proof of service attached to defendant's notice of appeal states that on December 28, 2011, defendant placed his notice of appeal in the institutional mail at the prison where he was being held, properly addressed to the Circuit Court of Cook County and to the State’s Attorney's office. Defendant's proof of service complies with Rule 12(b)(3) and establishes that defendant deposited his notice of appeal in the prison mail system within 30 days of the order dismissing his petition. We therefore conclude that defendant's notice of appeal was

timely filed and that we have jurisdiction to consider defendant's appeal. Having so concluded, we now consider the dismissal of defendant's post-conviction petition.

¶9 The Post-Conviction Hearing Act (the Act) provides a mechanism by which criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution and the Illinois Constitution. 725 ILCS 5/122-1 *et seq*. (West 2010); *People v. Mahaffey*, 194 Ill. 2d 154, 170 (2000). The standard of review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act uses a three-step process for reviewing post-conviction petitions in noncapital cases. See 725 ILCS 5/122-1 *et seq.* (West 2010). To survive dismissal at the initial stage, the post-conviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶10 Nevertheless, a post-conviction petition is not to be used as a second appeal from the underlying conviction or a relitigation of guilt or innocence. *People v. Thompkins*, 161 Ill. 2d 148, 157 (1994). The Illinois Supreme Court has held that the doctrines of *res judicata* and waiver are appropriate for summary dismissal of post-conviction petitions. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). *Res judicata* means that the reviewing court will not make determinations on any claims already decided by the lower court. *People v. Miller*, 203 Ill. 2d 433, 437 (2002). Furthermore, issues that were apparent from the record and thus could have been presented on direct appeal but were not are waived. *Id.* The waiver rule is relaxed when facts relating to the alleged ineffectiveness of counsel do not appear on the face of the record. 725 ILCS 5/122–2 (West 2010); *People v. DeSavieu*, 256 Ill. App. 3d 731, 734 (1993).

¶11 The Act requires that the allegations in a post-conviction petition must be supported by affidavits, records, or other evidence or a petitioner must state why the same are not attached.

725 ILCS 5/122–2 (West 2010). The purpose of requiring these materials is to ensure that the allegations in a petition are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). The Illinois Supreme Court holds that to support ineffective assistance of counsel claims for failure to call a witness, post-conviction petitioners must introduce affidavits from those individuals who would have testified. *People v. Guest*, 166 Ill. 2d 381, 402 (1995). Failure to attach independent corroborating documentation or explain its absence can be excused where the petition contains facts sufficient to infer that the *only* affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney. *Collins*, 202 Ill. 2d at 67-68. However, where the *entire claim* rests on the alleged testimony of a third party and a defendant could have made efforts to obtain that person's affidavit, an affidavit from that possible witness must be attached or its absence explained. *People v. Barcik*, 302 Ill. App. 3d 183, 190 (2006). Without this additional support or explanation of its absence, the gist standard of post-conviction review has not been met and this court may dismiss the petition as frivolous and patently without merit. *Id.*

¶12 Defendant first argues that his petition set forth the gist of a meritorious claim that he received ineffective assistance of trial counsel. Specifically, in his petition defendant claimed that his trial counsel was ineffective for failing to investigate and call as a witness the police officer who allegedly asked defendant about a gun in the front seat of the car. The record shows that defendant testified at trial that he was receiving medical care in an ambulance after his arrest when a police officer approached and asked him "[w]ho [*sic*] pistola in the front seat in the passenger car?" Defendant further testified that he responded, "ain't no gun in the car." Defendant now claims that had his trial counsel called this officer to testify at trial, that testimony would have supported defendant's assertion during trial that he did not possess a gun

on the day of his arrest.

¶13 We initially find that defendant's claim is waived because it was apparent from the record and therefore could have been raised on direct appeal. The record shows that defendant testified at trial about this officer approaching and asking him about the gun in the front seat of the car. Defendant also testified at trial that he had hoped the officer would "be here today." The record further shows that this officer was not called as a witness at defendant's trial. Based upon the above, we conclude that defendant's claim that counsel was ineffective for failing to call this officer as a witness was apparent from the trial record and could have been raised on direct appeal. Defendant asserts that the record does not show whether trial counsel investigated the officer even though it does show the officer was not called at trial. Although it is true that the record does not show whether counsel investigated the officer, our review establishes that defendant's ultimate claim is based on counsel's failure to call the officer as a witness, a claim that was apparent from the record and could have been raised on appeal. Because it was not, we find that the claim is waived.

¶14 In reaching this conclusion, we recognize that a post-conviction petitioner is not procedurally barred by waiver when his or her failure to raise an ineffective assistance of counsel claim on direct appeal was due to the ineffective assistance of appellate counsel and that claim is explicitly raised in the post-conviction petition. *People v. Mack*, 167 Ill. 2d 525, 532 (1995). This exception does not apply here because defendant made no allegation in his petition that appellate counsel was ineffective for failing to raise this claim on direct appeal.

¶15 We also find that defendant's claim was properly dismissed because he failed to either attach an affidavit from the officer to his petition or explain its absence. Defendant claims that the only affidavit he could have attached was that of his attorney, so failing to explain why he

did not obtain the officer's affidavit should not bar his claim. While failure to attach such an affidavit may be excused where the petition contains facts sufficient to infer that the only affidavit a petitioner could furnish other than his own was that of his attorney, that is not the case here. In this case, as previously noted, our review establishes that defendant's entire claim is based on the alleged testimony that the officer would have provided had the officer been called as a witness at trial. We also note that defendant's failure to attach the affidavit of the officer results in his failure to show the objective and independent corroboration that is the goal of section 5/122-2 of the Act. See *Collins*, 202 Ill. 2d at 67. It is relatively easy for a defendant to claim that an officer would corroborate his claims and testify in a certain way. However, in the absence of a police report containing such a statement by the police officer or an affidavit, the defendant has made no showing at all that his claim would have been supported by the officer. Furthermore, defendant could have made efforts to obtain this officer's affidavit, and he was therefore required to attach an affidavit from the officer or explain its absence. *See* 725 ILCS 5/122–2 (West 2010); *Barcik*, 302 Ill. App. 3d at 190. In his petition and supporting affidavit, defendant made no mention as to why an affidavit from the officer was not attached to his petition, nor did he mention any attempts to obtain such an affidavit. In the absence of any explanation by defendant as to why he was unable to obtain the officer's affidavit, we find that his ineffective assistance of counsel claim was properly dismissed.

¶16 Defendant next asserts that we should remand this case and direct the trial court to issue a corrected mittimus and change his MSR term from three years to two years.

¶17 In this case, defendant was sentenced as a Class X offender pursuant to section 5/5-5-3(c)(8) of the Unified Code of Corrections (the Code), which provides:

"When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2

> felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2008).[1]

The record shows that at the time he was sentenced, defendant had multiple prior Class 2 felony convictions and the trial court had just found him guilty of one count of UUWF, a Class 2 felony. As such, defendant was sentenced to 22 years in prison as a Class X offender and also to a 3-year MSR term. *See* 730 ILCS 5/5-8-1(d)(1) (West 2008) (providing for a three-year MSR term for first degree murder or Class X felony).

¶18 Defendant notes that UUWF is a Class 2 felony and under section 5/5-8-1(d)(2) of the the Code, the MSR term for a Class 2 felony is only two years. Defendant therefore claims that a three-year MSR term for him is improper and he instead should have been given a two-year MSR term.

¶19 We initially note that although this claim is being raised for the first time on appeal, we may consider it because a claim that a sentence was imposed in violation of a statutory authority may be raised at any time. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). The standard of review for this issue is also *de novo*, as it involves a question of statutory interpretation. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996).

¶20 This Court has considered this issue and repeatedly held that the three-year MSR term is proper when a defendant is sentenced as a Class X offender based upon prior qualifying convictions and a current Class 1 or Class 2 felony conviction. *People v. Wade*, 2013 IL App.

[1] In 2008, this statute was codified under 730 ILCS 5/5-5-3(c)(8). The statute has since been re-codified as 730 ILCS 5/5-4.5-95(b) (2010). In this opinion however, the Court refers to this statute as 730 ILCS 5/5-5-3(c)(8).

(1st) 112547 at ¶¶ 31-38; *People v. Brisco*, 2012 IL App (1st) 101612 at ¶¶59-62; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (1st Dist. 2011); *People v. Lampley*, 405 Ill. App. 3d, 13-14 (1st Dist. 2010); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1st Dist. 1995); *People v. McKinney*, 399 Ill. App. 3d 77, 78-83 (2nd Dist. 2010); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2nd Dist. 2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (3rd Dist. 2009); *People v. Allen*, 409 Ill. App. 3rd 1058, 1078 (4th Dist. 2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (4th Dist. 2010); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (4th Dist. 2000); *People v. Davis*, 2012 IL App. (5th) 100044, ¶¶26-34. In reaching this conclusion, this Court has reasoned "the gravity of conduct offensive to the public safety and welfare, authorizing Class X sentencing, justifiably requires lengthier watchfulness after prison release than violations of a less serious nature," so attaching a three-year MSR term to a Class X felony pursuant to the Statute is reasonable. *Anderson*, 272 Ill. App. 3d 537, 541-42 (1st Dist. 1995). Defendant provides no reasoned analysis as to why we should depart from these holdings. We continue to adhere to these holdings and therefore find that defendant was properly given a three-year MSR term.

¶21 In reaching this conclusion, we reject defendant's claim that under the decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), he should have been given a two-year MSR term. In *Pullen*, our supreme court held that the two most serious felony offenses for which the defendant was convicted, and not Class X felony for he was sentenced, established maximum aggregate term of consecutive sentences for the defendant. *Id*. at 43-46. Some of the cases cited above have considered this same argument and found that *Pullen* did not require a contrary result because it dealt with the consecutive sentencing provision and maximum aggregate prison terms and not the MSR statute at issue in this case. *See e.g. Brisco* , 2012 IL App (1st) 101612 ¶62; *McKinney*,

399 Ill. App. 3d at 83; *Lee*, 397 Ill. App. 3d at 1073. We again follow this line of cases and find that *Pullen* does not establish that defendant should have been given a two-year MSR term.

¶22 For the foregoing reasons, the judgment of the Circuit Court of Cook County dismissing defendant's post-conviction petition is affirmed.

¶23 Affirmed.

¶24 Presiding Justice Gordon, concurring in part and dissenting in part.

¶25 In the case at bar, defendant appeals from the summary first-stage dismissal of his postconviction petition.

¶26 I concur with the majority's holding that, since the proof of service attached to defendant's notice of appeal states that the notice was placed in the institutional mail at the prison within 30 days of the order dismissing his petition, defendant's notice of appeal was timely and we have jurisdiction to hear his appeal.

¶27 I also concur with the majority's holding that defendant properly received a three-year MSR term.

¶28 However, I dissent from the majority's holding that defendant waived his ineffectiveness of counsel claim by not raising it on direct appeal. Since defendant's ineffectiveness of counsel claim is based on his allegation that his trial counsel failed to investigate a witness, the claim is based on facts outside the trial record and thus was not waived. *People v. Villanueva*, 382 Ill. App. 3d 301 (2008).

¶29 In *Villanueva*, the defendant raised on direct appeal a claim that his trial counsel was ineffective for failing to investigate witnesses. *Villanueva*, 382 Ill. App. 3d at 307. This is the same claim that defendant now raises in the postconviction petition before us. In *Villanueva*, we held that "defendant's argument fails [on direct appeal] because it asks us to venture outside the

record." *Villanueva*, 382 Ill. App. 3d at 309. However, we did point out in *Villanueva* that the defendant could still raise this issue in a postconviction petition. *Villanueva*, 382 Ill. App. 3d at 309 n.1. We explained: "Defendant may raise issues that require consideration of matters outside of the record, specifically a claim of ineffectiveness of counsel, in a timely petition for postconviction relief." *Villanueva*, 382 Ill. App. 3d at 309 n.1.

¶30 The majority's decision in the case at bar sets up the perfect Catch-22 for the unwary defendant. If he raises on direct appeal a claim of failure to investigate, it will be dismissed because it refers to matters outside the record. However, if he waits to raise it on a postconviction petition, then it will be dismissed as waived for failing to raise it on direct appeal. The majority expects a *pro se* petitioner to be able to draw the fine line between instances when a failure to investigate should be raised on direct appeal and when it should be raised in a postconviction petition. I cannot concur with hanging a prisoner's right to be heard on such a slender thread.

¶31 The majority holds, without a single supporting citation, that, since it was "apparent" from the record that counsel did not call the witness, therefore the claim could have been raised on direct appeal. The majority completely misstates the issue. The issue is not whether the claim was apparent – in effect, supported by the record -- but whether we could have resolved defendant's claim that his trial attorney failed to investigate this witness, without venturing outside the record. *Villanueva*, 382 Ill. App. 3d at 309.

¶32 I must also dissent from the majority's holding that a petition must be summarily dismissed at the first stage because defendant did not attach an affidavit from the witness whom his counsel failed to investigate. Our supreme court recently held that a trial court may not dismiss a postconviction petition at the first stage solely because it lacks a verification affidavit.

People v. Hommerson, 2014 IL 115638, ¶ 11. In *Hommerson*, the petitioner alleged ineffectiveness of trial counsel, which is the same claim alleged in the case at bar. *Hommerson*, 2014 IL 115638, ¶ 4. Our supreme court explained that, "at the first stage of proceedings, the court considers the petition's substantive virtue rather than its procedural compliance." *Hommerson*, 2014 IL 115638, ¶ 11. With respect to a lack of an affidavit, our supreme court held: "That deficiency is properly the subject of a motion to dismiss at the second stage of proceedings." *Hommerson*, 2014 IL 115638, ¶ 11. Similarly, on the facts of the case at bar, where the fact of the missing witness is so readily apparent from the face of the trial record, the deficiency of an affidavit from that witness may be properly the subject of a motion to dismiss at the second stage, but it is not a reason to find the petition frivolous and patently without merit.

¶33 As the majority has already observed, defendant's claim is "apparent" or amply supported by the record. *Supra* ¶ 13. At trial, defendant testified about his conversation with the missing witness and testified that he hoped the witness would "be here today" in court. *Supra* ¶ 13.

¶34 The majority does not address the merits of defendant's claim. In the case at bar, Officer Chatys testified at trial that, while he was chasing defendant on foot, defendant took the time to reach into his waistband and toss a handgun, in plain sight, on to the sidewalk. According to Officer Chatys, defendant not only tossed the gun on to the sidewalk, but he also tossed the gun "almost directly" in front of the officer.

¶35 Defendant testified at trial that, after he was stopped, a "Latino" officer asked him whose gun was that on the front passenger seat of the vehicle. If, at the time of defendant's arrest, the gun was on the passenger seat of the vehicle, then it could not have been neatly dropped at Officer Chatys' feet during the chase.

¶36 In the case at bar, the issue was primarily a credibility contest between a police officer

and defendant. If the missing witness, who was also a police officer, would have corroborated a key part of the defendant's testimony, that could have tipped the scales when the factfinder weighed credibility.

¶37 As a result, I would find that defendant alleged a claim sufficiently to survive being dismissed at the first stage as frivolous and patently without merit.