

FOURTH DIVISION
December 11, 2014

No. 1-12-2938

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. 06 CR 7482
)	
MICHAEL BRADLEY,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Second-stage dismissal of defendant's amended postconviction petition was affirmed where defendant failed to make a substantial showing that the untimely filing of his claims was not due to his culpable negligence.
- ¶ 2 Defendant, Michael Bradley, appeals the second-stage dismissal of his amended petition for relief under the Post-conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West

2010)). On appeal, defendant contends that the trial court erred in granting the State's motion to dismiss the petition because: (1) he made a substantial showing that the late filing of his petition was not due to his culpable negligence, and (2) his due process rights were violated when, during his guilty plea, the court failed to inform him that the mandatory supervised release (MSR) he would be required to serve was an indeterminate period of three years to natural life. We affirm.

¶ 3 Defendant was charged in a 41-count indictment that included multiple counts of aggravated criminal sexual assault, criminal sexual assault, home invasion, and residential burglary, all occurring on December 30, 2005. Defendant was also charged in three separate indictments with residential burglaries occurring on other dates.

¶ 4 On June 4, 2007, pursuant to a negotiated guilty plea agreement, defendant entered pleas of guilty to two counts of aggravated criminal sexual assault and one count of home invasion in case number 06 CR 7482. The agreed factual basis for the plea indicated the victim in all three counts was a resident of a DePaul University dormitory building in Chicago. Defendant also pleaded guilty to one count of residential burglary in each of three other indictments. Under the terms of the plea agreement, defendant would serve 17 years in prison on each of the two aggravated criminal sexual assault counts and 6 years on the home invasion count, all sentences to be served consecutively, for a total of 40 years; he would also serve 7 years on each of three residential burglary counts, to be served concurrently with each other and with one count of aggravated criminal sexual assault. Prior to accepting defendant's plea, the trial court advised defendant as to the sentencing range and maximum fine that could be imposed on each charge, including a range of 6 to 30 years in prison for the Class X offenses of aggravated criminal sexual assault and home invasion. The court advised defendant that the sentencing range for residential burglary was 4 to 15 years and the MSR term for that offense was 2 years. Then the

court stated: "The more serious charges of home invasion and aggravated criminal sexual assault require you to serve 3 years of mandatory supervised release or parole upon completion of your sentences. Do you understand that?" Defendant replied that he did. The court accepted defendant's plea of guilty and sentenced him according to the terms of the agreement. Defendant did not file a post-plea motion or otherwise attempt to appeal the judgment entered on his plea conviction.

¶ 5 On December 29, 2010, defendant placed in the prison mail and addressed to the trial court clerk a *pro se* postconviction petition accompanied by a signed and notarized proof of service. The petition was filed in court on January 7, 2011. Defendant's petition acknowledged that it was not timely filed but asserted he had "just recently learned" that the change-of-plea trial court judge was biased against him because both the judge and the victim attended DePaul University. The petition also claimed defendant was denied effective assistance of counsel in that his defense counsel: failed to file motions to suppress statements or interview any police officers present during custodial interrogation; failed to make any personal interviews on behalf of defendant; failed to file any motions other than a discovery motion; failed to inform defendant that (1) the judge was a graduate of the DePaul University College of Law, the university attended by the victim, (2) the judge was against any plea agreement other than the one accepted by defendant, and (3) the judge was biased against defendant; and that counsel failed to file a motion for a substitution of judge due to that bias. Defendant also averred that if he had known of the judge's bias, he would have requested a jury trial. In his prayer for relief, defendant acknowledged the late filing of his petition and asked the court to consider "the fact that he just learned of sentencing judge's attendance and graduation from the victim(s) [sic] school." The sole attachment to the *pro se* petition, defendant's affidavit, was a general attestation to the truth

of the matters asserted in the petition.

¶ 6 Counsel was appointed to represent defendant and the petition was advanced to the second stage of postconviction proceedings. On April 5, 2012, appointed counsel filed her certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), together with an amended petition which did not adopt the allegations from the original *pro se* petition. The amended petition, however, advanced two new claims for relief.

¶ 7 The first new claim averred that the sentences on defendant's two convictions for aggravated criminal sexual assault were void because the sentencing court incorrectly advised defendant the sentence range was 6 to 30 years in prison; that the court had failed to add a statutorily mandated 10-year sentence enhancement to each count pursuant to section 12-14(d)(1) of the Criminal Code of 1961 (Code), where defendant had displayed a weapon other than a firearm, namely, a knife, making the applicable range 16 to 40 years. Citing *People v. Arna*, 168 Ill. 2d 107 (1995), and other case law, the amended petition argued that defendant's untimely filing of his petition did not bar that claim because a void sentence may be challenged at any time.

¶ 8 The amended petition's second claim alleged that defendant was denied due process when he pleaded guilty in exchange for a specific sentence and the sentencing court incorrectly advised him that the MSR term for the two counts of aggravated criminal sexual assault was three years. When the offenses were committed on December 30, 2005, the applicable MSR term for aggravated criminal sexual assault was an indeterminate term ranging from three years to natural life. 730 ILCS 5/5-8-1(d)(4) (West Supp. 2005). The amended petition averred that if defendant had known that the MSR term would extend up to a maximum of natural life, he would not have pleaded guilty. Citing *People v. Whitfield*, 217 Ill. 2d 177 (2005), defendant complained that he

received a sentence more onerous than that which he agreed to and that the appropriate remedy would be to vacate his guilty plea.

¶ 9 The website of the Illinois Department of Corrections currently shows that defendant's projected discharge date is entered as "3 YRS TO LIFE – TO BE DETERMINED."¹

¶ 10 The amended petition acknowledged that, to raise the *Whitfield* due process claim, defendant was required to file his postconviction petition no later than three years from June 4, 2007, the date of his conviction, but that his *pro se* petition, mailed to the court on December 29, 2010, had not been timely filed. Defendant asked the trial court to find that the delay was not the result of culpable negligence on his part. Attached to the amended petition were a complete copy of the 18-page transcript of defendant's guilty plea, prepared and dated November 2, 2011; the affidavit of defendant; a one-page printout from the Illinois Courts website; another copy of the guilty plea transcript, dated October 28, 2010, with page six missing; and the affidavit of Kalendice O. Nwarache, who had sent the website page to defendant.

¶ 11 Defendant's affidavit appended to the amended petition was notarized on February 28, 2012. It stated in pertinent part that on June 4, 2007, he pleaded guilty to two counts of aggravated criminal sexual assault and one count of home invasion, and that those offenses occurred in a student dormitory on DePaul University's Lincoln Park campus. The victim in those three counts was a female student attending DePaul University. At the time of his plea, he was unaware that the sentencing judge was a graduate of the DePaul University College of Law, and his trial attorney never told him that the judge was connected with DePaul University. He learned of the connection when a family member sent him a copy of a printout from the Illinois

¹ This court may take judicial notice of information on the Department's website. See *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2005).

Courts website, dated May 16, 2010, and he believed the connection provided a legal basis for challenging his guilty plea. He asked his family members to order a transcript of his guilty plea. His family did so and he received an incomplete copy on November 5, 2010. Because the transcript was missing page 6, he did not attach it to his original postconviction petition. The court reporter's certificate was dated October 28, 2010.

¶ 12 Defendant's affidavit also averred that, during the change-of-plea hearing, the sentencing judge "did not correctly admonish me as to the 'three years to life' term for mandatory supervised release. If I had known of the possibility of lifetime mandatory supervised release, I would not have agreed to plead guilty. I would have gone to trial." Defendant also averred that, "[b]ecause of the lockdowns at Menard, I was denied access to the law library and was delayed in doing the necessary research." He was also unable to go to the law library to get his postconviction petition and accompanying motions notarized until December 29, 2010. After his petition was notarized, he promptly mailed it.

¶ 13 Attached to the affidavit was a printout of a page from the Illinois Courts website, featuring a biographical sketch of the judge who accepted defendant's guilty plea and stating that the judge had graduated from DePaul University College of Law with a Juris Doctor degree. The transcript of defendant's plea of guilty was also attached to the affidavit; page six was missing from the transcript.

¶ 14 The affidavit of Kalendice O. Nwarache, notarized on December 13, 2011, stated that on May 16, 2010, she came across information on the Internet that the judge who convicted defendant had attended DePaul University's law school. The information appeared to indicate a conflict of interest. She printed it and sent it to defendant.

¶ 15 Also attached to the amended petition was a complete transcript of defendant's guilty plea

on June 4, 2007. The transcript was prepared and dated November 2, 2011.

¶ 16 The State filed a motion to dismiss the petition. As to defendant's claim that his sentences on the aggravated criminal sexual assault counts were void as lacking the 10-year sentence enhancement, the State argued that the sentence range with the enhancement was 16 to 40 years and that defendant's 17-year sentences were within that range. As to defendant's claim that the sentencing court's misstatement about the length of MSR on the aggravated criminal sexual assault counts resulted in his being denied the sentences he bargained for, the State contended defendant's petition was untimely and that he offered no facts to show why the delay in filing was not due to defendant's culpable negligence. On the merits of that claim, the State argued that the sentencing court substantially complied with the requirements of the law and that the imperfect admonishment was not reversible error.

¶ 17 After arguments were presented by counsel for the parties on the State's motion to dismiss defendant's petition, the trial court granted the motion. The trial court found that the petition was untimely and defendant had not provided a sufficient excuse for the delay.

¶ 18 On appeal, defendant contends that where he lacked culpable negligence for the late filing of his *pro se* petition, the trial court erred in dismissing the amended petition. Defendant has abandoned the 10-year sentence enhancement claim of his amended petition and identifies a single issue: that his constitutional right to due process and fundamental fairness was violated because he pleaded guilty in exchange for a specific sentence, including a determinate MSR term of three years, but received a different, more onerous sentence--a MSR term of three years to natural life--than the one he had agreed to. Defendant has forfeited any other basis for relief.

¶ 19 The Act permits collateral constitutional challenges to criminal convictions and sentences. *People v. LaPointe*, 227 Ill. 2d 39, 43 (2007). "To be entitled to postconviction relief,

a defendant must demonstrate that he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *Whitfield*, 217 Ill. 2d at 183. The second-stage denial of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Marshall*, 381 Ill. App. 3d 724, 730 (2008).

¶ 20 Section 122-1(c) of the Act provides: "If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, 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 2010). If the three-year window for filing a postconviction petition expires, the defendant fails to properly allege facts that show the late filing is not due to his culpable negligence, and the State moves to dismiss the petition at the second stage, the trial court is directed to dismiss the petition as untimely barring amendment by the defendant. *People v. Perkins*, 229 Ill. 2d 34, 43 (2008). Our supreme court has held that "the 'culpably negligent' standard contained in section 122-1(c) contemplates something greater than ordinary negligence and is akin to recklessness." *People v. Bocclair*, 202 Ill. 2d 89, 106-08 (2002). The sole obligation for filing a timely postconviction petition remains with the defendant. *People v. Lander*, 215 Ill. 2d 577, 588-89 (2005). "The burden rests with the defendant to prove a lack of culpable negligence." *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008). A trial court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence will not be reversed unless manifestly erroneous. *People v. Caballero*, 179 Ill. 2d 205, 214 (1997). However, the trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*. *People v. Wilburn*, 338 Ill. App. 3d 1075, 1077 (2003).

¶ 21 Defendant's date of conviction was June 4, 2007, when he entered his plea of guilty and

sentence was imposed. The deadline for filing a postconviction petition was June 4, 2010.

However, his *pro se* postconviction petition was not filed until December 29, 2010, when he placed the petition and a signed and notarized proof of service in the prison mail system in compliance with Supreme Court Rule 12(b)(3) (eff. Nov. 15, 1992). Defendant concedes that, as he is not challenging his sentence as void, he was required to demonstrate that the late filing of his petition was not due to his culpable negligence.

¶ 22 Defendant contends that his delay in filing his *pro se* petition was not due to culpable negligence on his part because he did not learn of the basis for his judicial bias claim until May 2010, when a family member mailed him a printout from an Illinois Courts website showing that the trial judge attended the same school as the victim. However, the three-year period for filing a postconviction claim begins with the date of conviction, not the date that defendant learns of his claim. *People v. Davis*, 351 Ill. App. 3d 215, 217-18 (2004). His 2012 affidavit contended the printout from the Illinois Courts website was dated May 16, 2010, several weeks before the filing deadline, but defendant did not state when he received the website page or why he did not or could not prepare the petition at that time, attach the website printout, and file it in a timely manner. He does not explain why he did not then get an affidavit from Kalendice Nwarache or prepare an affidavit of his own.

¶ 23 Of greater significance is the fact that the *pro se* petition also raised claims of ineffective assistance of trial counsel. Some of his claims of ineffective counsel had nothing to do with judicial bias and could have been raised at any time after defendant's conviction in June 2007, but neither in the trial court nor in this court has defendant offered any explanation as to why he failed to timely raise those claims.

¶ 24 Defendant alleges the time taken to procure the transcript of his guilty plea excused his

late filing. We disagree. The allegations of judicial bias and ineffectiveness of counsel defendant raised in his *pro se* petition related to circumstances and events taking place prior to defendant's guilty plea. Consequently, the transcript of the guilty plea did not support those allegations.

Moreover, defendant never specified the date that he received the Illinois Courts website printout or on what date he asked his family to order the transcript of his guilty plea, and never explained why the transcript was not prepared and certified until October 28, 2010. Defendant could have filed a petition just after receiving the website printout. He could have submitted his affidavit, his cousin's affidavit, and the printout, but he did not explain his failure to do so promptly.

¶ 25 As to defendant's claim that the prison was on lockdown, the only reference to lockdown at Menard Correctional Center that defendant mentioned was the statement in his 2012 affidavit relative to his MSR claim: "Because of the lockdowns at Menard, I was denied access to the law library and was delayed in doing the necessary research." Defendant never mentioned any specific period(s) of time when the Menard facility was on lockdown between his receipt of the May 16 website page and the completion of his unsupported *pro se* petition on November 18.

¶ 26 We conclude that the record supports the trial court's finding that defendant was culpably negligent in failing to timely file his *pro se* postconviction petition. Given our disposition of this case on the basis of untimely filing of defendant's petition, we need not address the merits of defendant's MSR claim. See *People v. Ramirez*, 361 Ill. App. 3d 450, 455 (2005).

¶ 27 For the reasons set forth above, we affirm the trial court's second-stage dismissal of defendant's amended postconviction petition.

¶ 28 Affirmed.