2017 IL App (1st) 133584-U

No. 1-13-3584

Order filed July 21, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee	)	Cook County.
	)	
v.	)	No. 93 CR 23790
	)	
TYRONE WILLIAMS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's appeal dismissed for lack of jurisdiction.

¶ 2 Defendant Tyrone Williams filed a *pro se* petition for relief under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), which the circuit court denied "without prejudice." On appeal, defendant contends that his petition should be remanded for further proceedings under the Act because the circuit court did not properly rule on the petition within 90 days as required by section 122-2.1(a) of the Act (725 ILCS 5/122-2.1(a) (West 2012)). We dismiss.

¶ 3 Defendant's arrest and prosecution arose out of the September 12, 1993, shooting death of Clifton Burks. Following a bench trial, defendant was found guilty of first degree murder and sentenced to 40 years in prison.

¶ 4 The evidence at defendant's trial established through, *inter alia*, defendant's inculpatory statements, that defendant, codefendant Artez Thingpen, and another person were in a vehicle on September 12, 1993, looking for Willie Lloyd in order to kill Lloyd because Lloyd had "stuck up" codefendant's "dope spot."[1] At one point, the vehicle stopped and defendant exited to speak with Burks, who worked for Lloyd. Although defendant initially pulled out his firearms, he put them away. Codefendant and the other man then exited the vehicle and began firing their weapons at Burks. Defendant then entered the vehicle and the three men left. The trial court found defendant guilty of first degree murder and sentenced him to 40 years in prison. Defendant did not appeal.

¶ 5 In July 2013, defendant filed a *pro se* petition for postconviction relief. The petition first alleged that trial counsel was supposed to file an appeal, but did not. The petition next raised a claim of actual innocence based upon newly discovered evidence that would show that someone else committed the offense. The petition also alleged that defendant was denied the effective assistance of trial counsel when counsel failed to "use ballistics comparison" and call a witness.

¶ 6 At a July 11, 2013 hearing, the circuit court noted that defendant's petition had "no affidavits of anybody saying that they saw somebody else commit the murder." Therefore, the court stated that the "*pro se* petition for post-conviction relief is denied at this time without prejudice." The court further stated that defendant "may supplement [the] petition with affidavits

[1] Defendant and codefendant were tried separately.

of witnesses." Therefore, the "matter is off call for now with leave to reinstate it if he wants to file some additional affidavits." On November 27, 2013, this court granted defendant's motion for leave to file a late notice of appeal.

¶ 7 On appeal, defendant contends that this cause should be remanded for further proceedings under the Act because the circuit court did not properly rule on the petition within 90 days as required by section 122-2.1(a) of the Act. The State responds that this court must dismiss the instant appeal because the circuit court's dismissal of defendant's petition "without prejudice" is not a final and appealable order.

¶ 8 Our supreme court has instructed that a reviewing court must be certain of its jurisdiction prior to proceeding in a cause of action, and if jurisdiction is wanting, the reviewing court must dismiss the appeal. *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998); *People v. Smith*, 228 Ill. 2d 95, 104 (2008).

¶ 9 The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings under the Act, as in the case at bar, the circuit court is required to review the petition within 90 days, and if it finds the petition frivolous or patently without merit, *i.e.*, it has no arguable basis in law or in fact, the Act requires that the court dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Hodges*, 234 Ill. 2d at 10-11. A dismissal entered in this manner is a final judgment. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). See also *People v. Barber*, 381 Ill. App. 3d 558, 560, n. 1 (2008) ("the trial court's order dismissing the defendant's second postconviction petition without prejudice with leave to refile was erroneous because, *** the Act does not authorize

dismissals at the first stage of the proceedings without prejudice with leave to refile"). If, however, the court finds that the petition has merit, the petition will be advanced to the second stage and counsel will be appointed. 725 ILCS 5/122-4 (West 2012); *Hodges,* 234 Ill. 2d at 10-11.

¶ 10 In this case, the circuit court timely examined defendant's petition within 90 days, and stated that the "*pro se* petition for post-conviction relief is denied at this time without prejudice." The court further stated that defendant "may supplement [the] petition with affidavits of witnesses" and that the "matter is off call for now with leave to reinstate." Although defendant was advised of his right to appeal, and did, in fact, appeal the dismissal of his petition, a trial court's order entered "without prejudice" is not a final and appealable order. *Flores v. Dugan,* 91 Ill. 2d 108, 114 (1982); see also *Arnold Schaffner, Inc. v. Goodman,* 73 Ill. App. 3d 729, 731 (1979) (the statement, "without prejudice" indicates that an order is "on its face a nonappealable order").

¶ 11 Accordingly, we find that the "without prejudice" dismissal order entered by the circuit court was not a final judgment (*Harris,* 224 Ill. 2d at 126), and, as a result, we do not have jurisdiction to consider defendant's appeal (*Dugan,* 91 Ill. 2d at 114-15). Because the petition was not either dismissed as frivolous or patently without merit within 90 days of its filing (see 725 ILCS 5/122-2.1(a)(2) (West 2012)), or docketed for further consideration under the Act (see 725 ILCS 5/122-2.1(b) (West 2012)), the petition remains pending in the circuit court and subject to further proceedings under the Act.

¶ 12 Appeal dismissed.