2017 IL App (1st) 151002-U

SIXTH DIVISION
MARCH 10, 2017

No. 1-15-1002

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
	)	No. 08 CR 07467
v.	)	No. 07 CR 16796 (superseded)
HAROLD ULMER,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas P. Fecarotta,
	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) was properly dismissed as untimely, where the defendant did not allege facts showing that his delay in filing was not due to his culpable negligence.

¶ 2 The defendant-appellant Harold Ulmer (defendant) appeals from the order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). As his petition was untimely and fails to allege that the delay was not due to his culpable negligence, we affirm the circuit court.

¶ 3 BACKGROUND

¶ 4 Following a jury trial in the circuit court of Cook County, the defendant was convicted of aggravated driving under the influence of alcohol and reckless homicide. The facts underlying that conviction are set forth in further detail in our Rule 23 order affirming his conviction on direct appeal (*People v. Ulmer*, No. 1-08-2005 (2010) (unpublished order under Supreme Court Rule 23)), but are summarized below.

¶ 5 The defendant was driving his truck in Barrington Hills, Illinois on the morning of July 15, 2007, when his vehicle struck a motorcycle. The collision resulted in the deaths of the two individuals on the motorcycle, Brenda and Edward Aiello.

¶ 6 Barrington Hills Police Detective Ronald Ruffin arrived at the scene of the accident around 9:00 a.m. Detective Ruffin testified that the defendant was visibly upset but Detective Ruffin did not notice anything that caused him to believe that the defendant was under the influence of alcohol. Detective Ruffin did not place the defendant under arrest at that time, but transported the defendant to the Barrington Hills Police Station.

¶ 7 Detective Ruffin questioned the defendant at the police station. Around 10:15 a.m. Detective Ruffin requested that the defendant submit to field sobriety tests in the lobby of the police station. Detective Ruffin later testified that, although the defendant appeared to be passing the tests, the defendant could not complete them because he became emotional and began to cry. Neither Detective Ruffin nor any other officers noticed signs of intoxication in the defendant, until Police Chief Michael Murphy arrived at the police station around 11:15 a.m.

¶ 8 After Chief Murphy arrived he sat next to the defendant on a bench. According to his subsequent testimony, Chief Murphy detected the smell of alcohol on the defendant and noticed that the defendant's eyes were glossy and red. Chief Murphy requested that the defendant

undergo additional field sobriety tests, which the defendant failed. The defendant was then placed under arrest. A subsequent breathalyzer test indicated that the defendant's blood alcohol content was 0.104.

¶ 9 The police conducted multiple interviews with the defendant, which were videotaped. During a third interview with detectives, the defendant stated that there was a bottle of vodka in his garage. Sergeant Riedel asked the defendant if he would sign a consent form so that police officers could search his house. The defendant was told that if he did not sign, officers would obtain a search warrant, and his home could be damaged during a search. The defendant signed the consent form. At his house, police retrieved the bottle of vodka.

¶ 10 The State's original indictment charged the defendant with aggravated driving under the influence of alcohol (DUI), and four counts of reckless homicide. The four reckless homicide counts were explicitly premised, in part, on the fact that the defendant was under the influence of alcohol at the time of the collision.[1]

¶ 11 Prior to trial, the defendant moved to quash his arrest and suppress the results of his breathalyzer test. On February 5, 2008, the court conducted a hearing on that motion. After testimony from witnesses including Detective Ruffin, Chief Murphy and the defendant, the court denied the motion, noting that it based its decision on the defendant's testimony.

¶ 12 The defendant made separate motions to exclude certain of his post-arrest statements to police, claiming they resulted from interrogation after he had attempted to invoke his right to

[1] Counts 1 and 2 of the reckless homicide charges included the explanatory language: "to wit: [the defendant] drove a motor vehicle while the alcohol concentration in his blood or breath was 0.08 or more ***." Counts 3 and 4 included the explanatory language: "to wit: [the defendant] drove a motor vehicle while under the influence of alcohol to a degree that rendered [the defendant] incapable of safely driving."

remain silent and his right to counsel. The defendant also moved to suppress physical evidence of the vodka bottle recovered from his home, as the product of a coerced search.

¶ 13 A joint hearing on those motions was conducted on March 11, 2008. After hearing testimony from Sergeant Riedel, and viewing the videotaped police interviews, the trial court denied both motions to suppress.

¶ 14 On April 4, 2008, the defendant filed a motion to *in limine* to bar specific portions of his videotaped interviews, including portions relating to his drinking habits and past DUI cases. The court agreed to bar portions of the interviews referring to prior DUI convictions, but did not exclude the other requested portions.

¶ 15 Trial was scheduled to commence on April 28, 2008. Five days before trial was set to commence, on April 23, 2008, the trial court granted the State's motion to dismiss the original indictment against the defendant (indictment No. 07 CR 16796). On the same date, the State re-indicted the defendant under a 22-count indictment, No. 08 CR 7467 (the superseding indictment). The superseding indictment contained 20 counts of aggravated DUI, and two counts of reckless homicide. Notably, the two new reckless homicide counts in the superseding indictment did *not* contain the original indictment's explanatory language referencing the defendant's blood alcohol content. Thus, the new reckless homicide counts, unlike the charges in the initial indictment, were not dependent upon proof that the defendant was intoxicated at the time of the collision.

¶ 16 At that time, the defendant's trial counsel, Ernest Blomquist, moved to dismiss the new reckless homicide counts, alleging that they were barred on the grounds of compulsory joinder. After it weighed whether the defendant was prejudiced by the new indictments, the trial court declined to dismiss the charges, but offered the defendant a continuance of the trial to prepare a

defense against the superseding indictment. The defendant's counsel told the court that he had been “surprised” by the new charges contained in the superseding indictment, but declined to request a continuance of the trial.

¶ 17 Trial commenced on April 28, 2008. The State's case included several eyewitnesses to the collision, testimony from Officer Ruffin and Chief Murphy, as well as video of the defendant's interviews. In those interviews, the defendant admitted he had consumed vodka about 20 minutes before the collision, but stated that he did not believe he was under the influence of alcohol at the time of the accident.

¶ 18 The defense case included the testimony of Ronald Henson, Ph. D., who was offered as an expert on the topics of alcohol and field sobriety testing and "retrograde absorption." The defendant's counsel sought to elicit testimony from Dr. Henson regarding "retrograde extrapolation" of alcohol absorption into the body, to support the proposition that any alcohol the defendant had ingested did not render him intoxicated at the time of the collision. The State objected to his testimony, arguing that Dr. Henson lacked relevant medical qualifications. Outside the presence of the jury, the court heard argument and declined to exclude Dr. Henson. However, the court determined that Dr. Henson could not testify "as to medical matters" concerning alcohol absorption, because he was not a physician. Dr. Henson proceeded to testify to his opinion that the defendant's blood alcohol content would have been substantially less than .10 at the time of the accident. However, he admitted he did not know how much alcohol the defendant had consumed.

¶ 19 On May 2, 2008, the defendant was convicted of aggravated driving under the influence of alcohol and two counts of reckless homicide. He was then sentenced to fifteen years in prison

for aggravated driving under the influence, and two terms of five years for each count of reckless homicide, all sentences to run concurrently.

¶ 20 In his direct appeal, the defendant raised the following arguments: (1) the trial court erred in denying his motion to quash arrest; (2) the trial court erred in denying his motion to suppress post-arrest custodial statements; (3) the trial court erred in denying the motion to suppress evidence of the vodka bottle found at his home; (4) the trial court erred in denying the defendant's motion *in limine* to bar irrelevant and prejudicial material in the defendant's videotaped interview; (5) the trial court erred in denying the motion to dismiss the State's superseding indictment; (6) the State failed to prove the defendant guilty beyond a reasonable doubt; and (7) the defendant's 15-year sentence was excessive. On March 16, 2010, this court affirmed the conviction. The defendant's petition for leave to appeal to the Illinois Supreme Court was denied on September 29, 2010. *People v. Ulmer*, 237 Ill. 2d 586 (2010).

¶ 21 The defendant filed his postconviction petition on August 29, 2013. The petition contends that he was deprived of effective assistance of trial and appellate counsel, and that he was represented by the same counsel at trial and on direct appeal. Further, the petition argues that the trial court committed constitutional error when it allowed trial to proceed on the new charges of reckless homicide in the second indictment. The petition also contends that the trial court violated his constitutional rights when it limited the testimony of his expert witness, Dr. Henson.

¶ 22 The defendant submitted a memorandum of law in support of the petition, which argues that his trial counsel was ineffective for, *inter alia*; (1) calling the defendant as a witness at the suppression hearing on the motion to quash his arrest; (2) agreeing to allow the court to view videos of the defendant's interrogation before deciding the motion to suppress statements contained therein; (3) failing to seek severance of the new reckless homicide counts contained in

the superseding indictment, on the basis of compulsive joinder; (4) declining the trial court's offers to seek a continuance in light of the superseding indictment; and (5) failing to hire a medical doctor as an expert witness. The defendant argued that he was not barred from raising these claims of ineffective assistance, despite their not being raised in his direct appeal, as trial counsel could not be expected to assert its own ineffectiveness in the direct appeal.

¶ 23 The memorandum of law also argued that the trial court erred in failing to sever or dismiss the new reckless homicide counts, pursuant to *People v. Hunter*, 2013 IL 114100 which, the defendant argued, "supports the trial court's responsibility for severing charges 'in the interest of justice.' " In a footnote, the defendant's memorandum of law in support of the petition additionally states "Because of *Hunter*'s elucidation regarding [the] Illinois compulsory joinder statute, defendant's postconviction submission are timely. Consequently, this Court need not concern itself with culpable negligence and the like regarding the timing of the foregoing postconviction submission."

¶ 24 The postconviction petition was also supported by affidavits from the defendant and his wife, Shirley, which sought to explain why the petition was not filed until August 2013. Shirley's affidavit contends that the defendant's trial counsel, Blomquist, insisted on proceeding with trial, even after she and the defendant told him that they favored a continuance in light of the new charges in the superseding indictment. She claims that Blomquist "stated angrily that he was ready to proceed, that everything was already scheduled, he knew best, and if we did not trust his judgment, we should get ourselves a new attorney."

¶ 25 Shirley also states that she was not made aware, until the trial was already in progress, that a plea agreement had been offered by the State. She claims that Blomquist advised the

defendant not to take a plea because Blomquist was confident of his success on appeal even if the defendant was convicted.

¶ 26 Shirley further states that, "Prior to the appeal Mr. Blomquist had some health issues and engaged attorney John Greenlees to argue the oral appeal."[2] However, "Mr. Greenlees was not as well versed as Mr. Blomquist as to what had transpired at trial."

¶ 27 After the conviction was affirmed on appeal, Shirley's affidavit describes various attempts made by her husband to contact Blomquist. Blomquist responded in a letter on November 1, 2010 which "outlined [defendant's] options." According to Shirley, the defendant responded two days later, requesting more information. After receiving no response, the defendant sent a follow up request in January 2011. In February 2011, Blomquist "referred the matter to Mr. Greenlees, telling the defendant that "there was little more [Blomquist] could give the case."

¶ 28 The defendant sent letters to Mr. Greenlees for several months without reply. Shirley, as well as her daughter, also unsuccessfully attempted to reach Greenlees. She states that: "Receiving no recognition from either Mr. Blomquist or Mr. Greenlees, [the defendant] concluded he had been left to his own devi[c]es." Shirley and the defendant made several requests for the trial transcript from Blomquist in October 2011 and February 2012. Shirley avers that, "weeks later," Blomquist's office finally contacted her and told her that she could pick up the transcript.

¶ 29 Shirley further stated that since April 2012 the defendant had been looking for new counsel. According to Shirley, she and the defendant had "communicated with many lawyers

[2]This statement in Shirley's affidavit appears to be inconsistent with the defendant's claims that he was represented by the same counsel at trial and on direct appeal.

who *** didn't understand this type of law which was the major reason for not presenting this affidavit sooner."

¶ 30 The defendant's affidavit in support of his petition similarly claims that, after the supserseding indictment was filed on April 23, 2008, he and Shirley requested that Blomquist "accept the [court's] offer of additional preparation time because we wanted to discuss and understand the new charges." However, Blomquist responded that "If we wanted a delay, we could find a new lawyer." The defendant also avers that he was never made aware of any plea offer from the State.

¶ 31 The defendant averred that he had "done all I could" to file "as soon as I could," but that his delay in filing the petition was due to "the long delay in getting my transcripts and records from Mr. Blomquist's office." He asserts he made numerous written requests regarding trial transcripts from late 2010 to February 2012. In February 2011, Blomquist wrote to the defendant "and said he could be of no further assistance, and referred [defendant] to attorney John Greenlees ** who had assisted Mr. Blomquist in writing my appeal." The defendant repeatedly wrote to Greenlees but received no response. It was not until 2012 that Blomquist's office made the records and transcripts available. However, the defendant claims that "it was not until my current postconviction lawyer became involved that any lawyer was able to accurately or correctly explain the background of the Illinois Postconviction Act."

¶ 32 The defendant's affidavit further states: "I understand that during 2013, the Illinois Supreme Court in *People v. Hunter*, 2013 IL 114100 clearly held that the State could not add new charges where the facts were known to the State all along, as they were in my case. I believe the *Hunter* decision also permits me to file my postconviction petition at this time."

¶ 33 On April 11, 2014, the trial court advanced the defendant's postconviction petition to second stage proceedings. On the same day, the State filed its motion to dismiss, which argued (1) that the petition was untimely and that defendant "offers no legal support for a claim that he was not culpably negligent for his late filing"; (2) that any claims already raised in the direct appeal were barred under the doctrine of *res judicata*; and (3) that the petition did not allege ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 34 On March 6, 2015, the trial court granted the State's motion to dismiss. The trial court remarked that it found that many of the issues raised by the petition had been litigated in the direct appeal and were barred by *res judicata*. The trial court additionally found that the postconviction petition was untimely, noting that the petition for leave to appeal was denied in September 2010, and the postconviction petition was not filed until August 2013. The trial court further explained that it also agreed with the State that the postconviction petition and supporting affidavits did not raise viable ineffective assistance of counsel claims under the *Strickland* standard, and thus would not have warranted advancing the petition to a third-stage evidentiary hearing.

¶ 35 On April 1, 2015, the defendant filed a timely notice of appeal with regard to the trial court’s dismissal of the postconviction petition.

¶ 36 ANALYSIS

¶ 37 We first note that we have jurisdiction to consider this appeal, because the defendant filed a notice of appeal within 30 days from the March 6, 2015 order of the circuit court of Cook County dismissing his postconviction petition. Ill. S. Ct. R. 651(a), (b) (eff. Jan. 1, 2013).

¶ 38 On appeal, the defendant argues that his postconviction petition was timely, that the issues presented in his petition were not barred by *res judicata*, and that his trial counsel was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 39 In response, the State argues that the petition was untimely under section 112-1of the Act (725 ILCS 5/122-1(c) (West 2012)), and alternatively that the petition's claims were already litigated and thus barred by *res judicata*. The State further argues that, even if not otherwise barred on these grounds, the defendant's trial counsel was not ineffective. For the reasons below, we agree with the trial court that the postconviction petition was untimely. Thus we affirm the dismissal on that basis.

¶ 40 "A proceeding under the Post-Conviction Hearing Act is not an appeal of the underlying conviction but, rather, represents a collateral attack on the trial court proceedings in which the defendant attempts to establish constitutional violations that have not been, and could not have been, previously adjudicated. [Citation.] Section 122-1 of the Act sets forth the time limitations in which a defendant must seek postconviction relief." *People v. Walker*, 331 Ill. App. 3d 335, 338-39 (2002). Section 122-1 states, in relevant part, that:

> "[N]o proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the defendant alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the defendant alleges facts showing that

> the delay was not due to his or her culpable negligence. " 725 ILCS 5/122-1(c) (West 2012).

¶ 41 Thus, a defendant has six months to file a postconviction petition after a direct appeal to either court is denied, unless he alleges that the delay was not due to culpable negligence. Although the legislature did not define the phrase "culpable negligence" as used in section 122-1 of the Act, our supreme court has indicated that culpably negligent conduct must rise beyond mere negligence and is "akin to recklessness." *People v. Rissley*, 206 Ill. 2d 403, 419-20 (2003).

¶ 42 In this case, because the petition for leave to appeal to the Illinois Supreme Court was denied on September 29, 2010, the defendant's postconviction petition was due on March 29, 2011. However, the defendant did not file his postconviction petition until August 29, 2013.

¶ 43 The defendant does not dispute that his petition was filed nearly three years after his leave to appeal to our supreme court was denied. Nonetheless, he raises two alternative arguments that, he claims, precluded his postconviction petition from being dismissed as untimely. First, he contends that his petition was not subject to second-stage dismissal for "culpable negligence" in filing an untimely petition, in light of the affidavits submitted by him and his wife regarding his difficulty in obtaining counsel. Alternatively, he asserts that the supreme court's 2013 decision in *Hunter*, 2013 IL 114100, constituted new authority supporting his petition that independently excuses its untimeliness.

¶ 44 We first reject the argument that, at the second stage of postconviction proceedings, dismissal could not be premised on his "culpable negligence," in light of the affidavits submitted to explain his delay in filing the petition. "A defendant asserting he was not culpably negligent for the tardiness of his petition must support his assertion with allegations of specific facts showing why his tardiness should be excused." *People v. Flowers*, 2015 IL App (1st) 113259, ¶

45 (citing *People v. Walker*, 331 Ill. App. 3d 335, 339-40 (2002)). The trial court is precluded from engaging in any fact finding during the second stage of postconviction proceedings and all well-pleaded facts must be taken as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 45 At the second stage of postconviction proceedings, the *de novo* standard of review applies to dismissal of a petition based on untimeliness. "[W]hen no evidentiary hearing is held or no fact-finding is conducted by the circuit court, the determination regarding culpable negligence turns solely on the legal sufficiency of the defendant's pleadings. [Citation.] The relevant inquiry thus becomes whether, taking the defendant's assertions concerning his lack of culpable negligence as true, the circuit court reached the correct legal conclusion. [Citation.] Hence, the applicable standard of review is *de novo.*" *Walker*, 331 Ill. App. 3d at 340; see also *People v. Pendleton*, 233 Ill. 2d 458, 473 (2006) (Whether a trial court should have proceeded to third-stage evidentiary hearing in a postconviction proceeding is purely a question of law that is reviewed *de novo*.)

¶ 46 In this appeal, the defendant's primary argument is that "culpable negligence" necessarily involves credibility issues that can only be decided after an evidentiary hearing, and thus dismissal on that basis cannot occur until the third stage of postconviction proceedings. Relying primarily on *People v. Wheeler*, 392 Ill. App. 3d 303 (2009), he argues that a defendant's "culpable negligence" may only be decided in the third stage of postconviction proceedings. He also cites *People v. Bumpers*, 379 Ill. App. 3d 611 (2008) (*vacated by* 229 Ill. 2d 632 (2008)), and *People v. Marino*, 397 Ill. App. 3d 1030 (2010), to argue that "culpable negligence issues include credibility findings" which must be "resolved only during the third-stage."

¶ 47 The defendant's reliance on these cases is misplaced, as he fails to distinguish between the inquiry of whether a defendant has *alleged* his lack of culpable negligence to survive a

second-stage motion to dismiss, from a *factual finding* of culpable negligence made at the third stage.

¶ 48 First, the defendant misreads the holding of *Wheeler*, 392 Ill. App. 3d 303, which states that *evidentiary findings* may not be made in the second-stage proceedings with regard to a defendant's "culpable negligence." In *Wheeler*, the defendant sought a reduced sentence because the trial court had failed to admonish him, prior to his guilty plea, that in addition to his prison sentence he would also serve a three-year term of supervised release. *Id*. at 304. Although the petition was untimely, the defendant submitted affidavits attesting that his delay in filing was due to factors including his "transfer from (5) different prisons over the past (3) years"; his confinement in an isolated cell for eight months for violating prison rules; the fact that his prison "was on a general lockdown for significant periods" in which he had no access to the library; and that the clerk of the court did not respond to his request for a transcript of his guilty plea. *Id.* at 304-05.

¶ 49 The trial court, at the second stage, and without any evidentiary hearing, had both (1) made a factual finding that defendant was not culpably negligent "based upon the facts and circumstances available on the basis of his affidavits" and (2) granted the petition and reduced the defendant's sentence. *Id.* at 306. The State then appealed. On appeal, our court agreed with the State that the trial court could not have made factual findings, or granted the petition's requested relief, without proceeding to a third-stage evidentiary hearing. *Id.* at 310-11.

¶ 50 The court in *Wheeler* explained: "when a trial court determines whether or not a defendant was culpably negligent, the trial court must assess the defendant's credibility. [Citation]. 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. Assessments of

credibility are better suited to a third-stage evidentiary hearing, which does not occur until after the State's answer, which never occurred in this case." *Id.* at 310. The *Wheeler* court thus "remand[ed] the case to the trial court for an evidentiary hearing to allow the State the opportunity to refute defendant's allegations denying culpable negligence in the untimely filing of his postconviction petition." *Id.* at 311.

¶ 51 Contrary to the defendant's suggestion, the *Wheeler* court did not hold that a defendant has the irrefutable right to advance to the third stage of postconviction proceedings whenever he submits an affidavit setting forth *any* excuse for his untimeliness. To the contrary, *Wheeler* recognized that "[a]t the second stage, the trial court may dismiss a petition as untimely: (1) *if the petition fails to contain 'allegations of lack of culpable negligence'*; and (2) if the State moves to dismiss on this ground." (Emphasis added). *Id.* at 308.

¶ 52 The other cases relied upon by the defendant, *Bumpers* and *Marino*, are similarly inapposite. Those decisions simply stand for the proposition that *if sufficient facts are alleged by the defendant* to show lack of culpable negligence in his untimely filing, an evidentiary hearing should be conducted before the court makes any *factual findings* as to the lack of culpable negligence, or the defendant's right to the relief requested.

¶ 53 The defendant in *Bumpers* (similar to the defendant in *Wheeler*) submitted an untimely petition claiming that, in connection with a guilty plea entered in 2000, the trial court failed to admonish him that his sentence included a period of mandatory supervised release (MSR). *Id*. at 612. With his petition, he submitted an affidavit stating that he had not learned of the MSR term until 2003. *Id.* at 613-14. In response to the State's motion to dismiss as untimely, the defendant also submitted an affidavit from his father regarding his difficulties in obtaining the transcript from the plea. *Id.* at 614. The trial court dismissed the petition as untimely; on appeal, our court

"f[ound] that defendant was not culpably negligent in filing his postconviction petition a year after the statutorily imposed deadline." *Id.* at 617. Our court proceeded to find that the defendant's rights had been violated, and entered an order reducing the sentence. *Id.* at 621. Significantly, however, our supreme court issued a supervisory order that vacated the appellate court order and "remand[ed] the cause to the circuit court for an evidentiary hearing, allowing the State [an] opportunity to refute defendant's allegations denying culpable negligence in the untimely filing of his postconviction petition." 229 Ill. 2d 632.

¶ 54 The third case relied on by defendant, *People v. Marino*, 397 Ill. App. 3d 1030 (2010), is also inapposite. There, the defendant alleged that he had accepted a plea on counsel's advice and, years later through his own research, discovered that "under the one-act, one-crime doctrine, he should have been sentenced for only one offense of armed robbery." *Id.* at 1031-32. Our court held that the petition should proceed to the third stage for evidentiary hearing, since "Marino alleged facts to support his contention that his late filing should be excused because he was not culpably negligent. He then backed up his allegation with an affidavit." *Id.* at 1036 (noting that "We will not presume that a defendant has knowledge of the full range of sentencing possibilities before he or she has been admonished of them, such that he or she is also presumptively culpably negligent in filing a late petition.").

¶ 55 The precedents relied upon by the defendant merely establish that, if a defendant has alleged sufficient allegations to show a lack of culpable negligence, he may avoid second-stage dismissal and is entitled to an evidentiary hearing at the third stage. Notwithstanding these cases, if the defendant fails to *allege* a reason for the delayed filing that demonstrates a lack of culpable negligence, dismissal may be warranted at the second stage, without a need to proceed to third-stage proceedings for findings of fact. See, *e.g.*, *Flowers*, 2015 IL App (1st) 113259, ¶

51 (affirming second-stage dismissal upon finding that petition's allegations and supporting affidavits regarding unsuccessful attempts to obtain a witness' affidavit, even if true, did not excuse untimeliness); *Walker*, 331 Ill. App. at 340 ("We find defendant's assertions legally insufficient to excuse his tardy requests for postconviction relief").

¶ 56 This is the situation presented here. That is, no assessment of credibility was needed to determine that the defendant failed to even *allege* a sufficient reason for his untimely filing. Even assuming the truth of the assertions in the supporting affidavits, they did not demonstrate that the untimely filing of the petition was not due to his own "culpable negligence."

¶ 57 The affidavits from the defendant and his wife allege that the delay in filing the petition arose from their former counsel's failure to respond to letters and phone calls, as well as their difficulty in finding a new attorney. However, the case law is clear that mere difficulty in finding an attorney to assist in a postconviction petition is not sufficient to allege a lack of culpable negligence. Specifically, our court has held that "A defendant's inability to secure counsel *** is not a justifiable excuse" for an untimely petition. *Walker*, 331 Ill. App. at 340 (citing *People v. Diefenbaugh*, 40 Ill. 2d 73, 74 (1968) (holding that financial inability to retain legal counsel to pursue a postconviction petition is insufficient to establish a lack of culpable negligence)). In *Walker*, we found that it was legally insufficient to allege that the defendant's counsel had "abandoned" him after direct appeal; this is precisely the reasoning cited in the affidavits supporting the defendant's petition. We explained that "[t]he law expects defendants wishing to obtain postconviction relief to familiarize themselves with the Act's procedural mandates. [Citations.] Thus, whether a defendant is able to retain counsel on his behalf to institute a postconviction claim has no bearing on the defendant's compliance with the applicable filing period." Id. at 341. *Walker* is dispositive of this case. That is, even assuming the truth of

the statements in the defendant's affidavits, he did not allege sufficient facts to excuse his delay of nearly three years in filing his postconviction petition.

¶ 58 We now turn to the defendant's independent contention that his postconviction petition should be considered timely due to the supreme court's disposition of *People v. Hunter*, 2013 IL 114100, following his conviction. *Hunter* concerned application of the compulsory-joinder statute, under which, if multiple "offenses are known to the proper prosecuting officer at the time of commencing the prosecution ***, they must be prosecuted in a single prosecution *if they are based on the same act*." (Emphasis added.) 720 ILCS 5/3-3(b) (West 2012). In *Hunter*, the police searched the defendant's car and found cannabis, as well as handguns. *Id.* ¶ 3. The defendant was charged in November 2008 with possession of cannabis with intent to deliver; the State later sought, in March 2009, to add gun-related counts stemming from the same search. *Id.* ¶ 6. The defendant contended that the compulsory joinder statute required the State to charge the gun-related offenses with the cannabis charge; and that its failure to do so resulted in violation of the speedy-trial statute. *Id.* ¶ 7. The trial court dismissed the gun-related charges, and the State appealed. *Id.* Our supreme court in *Hunter* thus addressed whether the possession of the cannabis and possession of the handgun were "based on the same act" for purposes of the compulsory joinder statute. Our supreme court answered in the affirmative, concluding that where the defendant simultaneously possessed cannabis and handguns that were "discovered during the same search", the "defendant committed a single physical act within the meaning of the compulsory joinder statute" and thus "the State was required to charge defendant with all of the offenses arising therefrom in a single prosecution." *Id.* ¶ 27.

¶ 59 The defendant argues that our supreme court's decision in *Hunter* operated to extend his time to file his postconviction petition because *Hunter* "clarified Illinois law regarding

compulsory-joinder of offenses known to the State at the time the State filed its original charges." That is, he asserts that *Hunter* was new authority supporting his argument that, under the compulsory joinder rule, the State was precluded from adding the new counts of reckless homicide in its second indictment. He suggests that the issuance of this precedent in 2013 served to toll his time for filing a postconviction petition containing a compulsory joinder argument.

¶ 60 This argument is without merit. It is true that an otherwise untimely postconviction petition may be permitted where it is based on recent authority that supports a *new* legal argument that was previously unavailable. "The delay in filing a postconviction petition may be excused when the petition is based on the issuance of a new case which changes the law applicable to the defendant's claim. [Citations.]" *People v. Wilburn*, 338 Ill.App.3d 1075, 1077 (2003) (holding that "defendant was not culpably negligent in failing to file his petition prior to the *Cervantes* decision because his substantive claim was established by that decision" and it "would be unfair to require defendant to file his petition based on the change in law occasioned by *Cervantes* before that decision was even issued.").

¶ 61 As the State points out, the compulsory joinder statute, and supreme court case law applying it, were established long before *Hunter*. See, *e.g.*, *People v. Williams*, 193 Ill. 2d 1 (2000); *People v. Gooden*, 189 Ill. 2d 209 (2000). That is, the proposition that charges based on the same act should be brought at the same time was certainly not new in 2013, and the defendant could have asserted his compulsory joinder argument under precedent before *Hunter*. *Hunter* clarified the application of that principle when multiple possession charges arise from items found in the same search, but that situation is inapplicable to the facts of the defendant's case.

¶ 62 Under the defendant's logic, any subsequent supreme court case that merely clarifies a rule of law under which an established right of relief is sought would preclude "culpable negligence" and excuse an otherwise untimely petition. We do not find this logic to be sound. While a defendant may bring an otherwise untimely petition that is premised upon a new rule of law recognized since his conviction, this does not mean that a defendant can point to *any* recent supreme court precedent clarifying a pre-existing legal principle as a means to avoid the time limitations set forth by the Act. Thus, the defendant cannot rely on *Hunter* to excuse his untimely petition.

¶ 63 Because we agree with the trial court that the petition was untimely, we may affirm dismissal on that basis, and we need not address the parties' arguments regarding the application of *res judicata* or the merits of the defendant's ineffective assistance of counsel claims.

¶ 64 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 65 Affirmed.