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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Carroll County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 02—CF—34
)	
JEREMY A. ROSE,)	Honorable
)	Val Gunnarsson,
Defendant-Appellant)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: Trial court properly granted State's motion to dismiss petitioner's post-conviction petition when petitioner failed to allege sufficient facts to show that the delay in filing a timely post-conviction petition was not due to his culpable negligence when: (1) he improperly relied on "PC Associates" to prepare his post-conviction petition when the petitioner knew that PC Associates were not attorneys and would not actually file a petition on his behalf; and (2) petitioner had adequate time to prepare and file his petition even when taking into consideration the time that he had no access to the law library or legal materials.

Petitioner was not denied the reasonable assistance of post-conviction counsel for failing to allege that petitioner's mental deficiencies may have caused him to file his petition late when such an allegation would have failed because: (1) several medical professionals found that petitioner had a rational appreciation of the

charges against him and could testify in a coherent manner; and (2) Department of Correction reports written during the time petitioner should have been preparing his post-conviction petition indicated that the petitioner had good insight and judgment.

State confessed error and conceded that the provision under which petitioner was sentenced had been declared unconstitutional and the sentencing provision had never been re-enacted. See *People v. Wooters*, 188 Ill. 2d 500, 520 (1999). Therefore, petitioner's void sentence is vacated and cause is remanded for petitioner to be re-sentenced according to the law that was in force before the adoption of the void statutory amendment. See *People v. Gersch*, 135 Ill. 2d 384, 290 (1990).

After a jury trial, the petitioner, Jeremy A. Rose, was found guilty but mentally ill of first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)) for killing his girlfriend's three-year-old daughter, Felicity Eppenstein. He was subsequently sentenced to a mandatory term of natural life imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2002). He later filed a *pro se* post-conviction petition. At a second stage hearing, the trial court granted the State's motion to dismiss the post-conviction petition as untimely. On appeal, the defendant argues that the trial court erred in granting the State's motion to dismiss because: (1) the late filing of his post-conviction petition was not due to his culpable negligence; and (2) he was denied the reasonable assistance of post-conviction counsel. In a supplemental brief on appeal, the petitioner also argues that his sentence of natural life imprisonment is void and must be vacated because the mandatory life imprisonment provision under which he was sentenced has been declared unconstitutional by the Illinois Supreme Court and has never been reenacted. See *People v. Wooters*, 188 Ill. 2d 500, 520 (1999); 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2002). For the following reasons, we affirm the trial court's order dismissing the post-conviction petition and vacate the petitioner's sentence and remand this cause for re-sentencing.

FACTS

Before trial, the petitioner was evaluated by several psychologists and a psychiatrist who all determined that the petitioner was fit to stand trial. Donald Pearson, a clinical psychologist, diagnosed the petitioner with major depressive disorder, which was recurrent and severe with psychotic features. Michael Chiappetta, a clinical psychologist, also evaluated and provided the following description of the petitioner in his report:

“The defendant has adequate factual knowledge and rational appreciation for the nature of the charges, the adversarial process, the roles of the participants at trial, and penalty if found guilty. Mr. Rose is oriented in time, place and person. He has good recall of the facts surrounding the incident. He can communicate with counsel and testify in a clear, coherent, relevant and linear fashion. He has no physical impairments. He is able to conduct himself appropriately in the courtroom.”

The petitioner was found fit to stand trial. At trial, Dr. Chiappetta testified that at the time of the murder the petitioner was undergoing a brief psychotic disorder that rendered him legally insane and could not appreciate the criminality of his conduct. The jury subsequently found petitioner guilty but mentally ill of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2002).

At the sentencing hearing, the State asked for the imposition of a natural life sentence under section 5—8—1(a)(1)(c)(ii) of the Unified Code of Corrections. 730 ILCS 5/5—8—1(a)(1)(c)(ii) (West 2002). Under that section, a sentence of natural life imprisonment was mandatory when the death penalty was not imposed and defendant was over the age of 17, and the victim was under the age of 12. See 730 ILCS 5/5—8—1(a)(1)(c)(ii) (West 2002). The trial court then sentenced the petitioner to imprisonment for natural life.

The petitioner's conviction and sentence were affirmed on direct appeal. *People v. Rose*, No. 2-03-1404 (2005) (unpublished order under Supreme Court Rule 23). The petitioner subsequently filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on March 29, 2006. *People v. Rose*, 218 Ill. 2d 553 (2006).

While petitioner was in the Department of Corrections, he was diagnosed with psychotic, anxiety, and bipolar disorders. Monthly treatment reports submitted during the time frame to file a post-conviction petition indicate that the petitioner reported that he was suffering from hallucinations, anxiety, tremors, depression and mood swings. However, several group therapy reports from the Department of Corrections during that same time period indicate that the petitioner appeared alert and oriented, had good eye contact with his therapists, had clear and concise speech, had logical and goal-directed thought processes, and good insight and judgment. The petitioner's mood was described as calm and pleasant.

On September 14, 2006, the petitioner filed a motion for extension of time to file a post-conviction petition. In that motion, he asked the trial court to grant him a 90 day extension, or to December 20, 2006, to file his post-conviction petition. As a basis for the motion to extend, the petitioner alleged that although he had hired PC Associates to prepare his post-conviction petition, as of the date the motion was forwarded to the court he had not received the prepared post-conviction petition. On September 18, 2006, the trial court denied the motion to extend, stating "[T]he defendant is directed to the time limitations provided under section 122-1 of the Post-Conviction Hearing Act."

On January 17, 2007, the petitioner mailed a *pro se* post-conviction petition to the circuit court. The petition was filed by the court on January 29, 2007. On February 8, 2007, the trial court found that the petition was not frivolous or patently without merit, and appointed counsel

to represent the petitioner. The State filed a motion to dismiss the petition and an amended motion to dismiss. In the amended motion, the State argued that the petition was untimely and that the petitioner did not adequately support the claims alleged in the post-conviction petition. Post-conviction counsel filed a response to the State's amended motion to dismiss. Attached to the response to the amended motion to dismiss was an affidavit signed by the petitioner. In the affidavit the petitioner made the following statement:

“4. That it was on or about September 14, 2006, that I came to the realization that Post Conviction Associates was not going to cooperate with me in the preparation of a post-conviction petition, and that I would need to proceed with the preparation of a post-conviction petition on my own.”

In that affidavit the petitioner also stated that during the time he had been incarcerated in the Department of Corrections he had been prescribed anti-depressants and psychotropic medication. He also noted that he had been having difficulty with short term memory loss and loss of concentration.

On May 29, 2008, a hearing was held on the State's motion to dismiss. After the hearing, the trial court withheld its ruling until post-conviction counsel was able to discuss with the petitioner the constitutional claims he raised in the petition and for counsel to file a certificate pursuant to Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

On July 8, 2008, the trial court found that it should not have heard arguments on the petition's timeliness until counsel had complied with Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Therefore, the trial court continued the cause. On October 14, 2008, post-conviction counsel amended the *pro se* petition and alleged that the petitioner was not culpably negligent in filing his petition late for the following reasons: (1) the petitioner's

grandfather, Virgil Poage, had hired a company named Post Conviction Associates (“PC Associates”) to prepare the post-conviction petition but the company failed to do so; (2) in his motion to extend the time to file a post-conviction petition, the petitioner had stated under oath that as of September 14, 2006, neither he nor his grandfather had received a prepared post-conviction petition from PC Associates; (3) from October 11, 2006, to November 14, 2006, the petitioner was transferred to prison units where he did not have access to his legal materials or the law library; and (4) on March 27, 2008, the Circuit Court of Rock Island County found that the proprietors of PC Associates had engaged in the unlicensed practice of law.

A copy of a letter from PC Associates to the petitioner dated May 20, 2006, was attached to the amended post-conviction petition as Exhibit A.

The letter from PC Associates to the petitioner stated, in part:

“Please copy your indictment, any transcripts, plea agreement, jury verdict, and judgment and commitment and send them to us as soon as possible. We will also need a listing of all of the actions you have filed in regards to direct appeals, post conviction, civil suits, etc., as we will have to compile your litigation history. We will review your case documents and find the issues of fact and law that will support a proper post conviction action under 725 ILCS 5/122. We will consult with you on the facts and issues and prepare the petition for you. *The decision as to what is submitted to the court is entirely up to you. We are not attorneys and we do not and cannot represent you.*”

Exhibit A (emphasis added).

On October 28, 2006, post-conviction counsel filed a certificate indicating that he had complied with Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Following arguments on the State's motion to dismiss, the trial court denied the post-conviction petition as untimely filed on January 27, 2007. Specifically, the trial court held that the petitioner's reliance on PC Associates was unreasonable because he knew they were not attorneys, relying on *People v. Lander*, 215 Ill. 2d 577 (2005). With regard to the petitioner's argument that he was not culpably negligent because there were periods of time where he could not access a law library or his legal materials, the court held that the petitioner was only prohibited from legal resources for 34 days and he did not show how this short length of time denied him a meaningful opportunity to prepare and file a post-conviction petition.

ANALYSIS

Post-Conviction Petition

On appeal, the petitioner first claims that the untimely filing of his post-conviction petition was not due to his culpable negligence because he relied on PC Associates to prepare his petition and they failed to do so, which caused him to belatedly prepare his own post-conviction petition only 21 days late. He argues that the trial court erred in relying on *Lander* and that it is inapposite to the instant case. *People v. Lander*, 215 Ill. 2d 577 (2005).

In response, the State argues: (1) the petitioner was actually 33 days late in filing his post-conviction petition, not 21 days as he alleges; and (2) the amended post-conviction petition did not allege sufficient facts to show that the late filing was not due to the petitioner's culpable negligence.

The decision to grant or deny a post-conviction petition on timeliness grounds presents a legal question and will be reviewed on a *de novo* basis. *People v. Bocclair*, 202 Ill. 2d 89, 97 (2002). The applicable statute of limitations for a post-conviction petition is the one in effect at

the time the petition is filed. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). The statute of limitations for post-conviction petitions filed in 2007 provided, in pertinent part:

“When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner 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 petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 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 2006).

The phrase “culpable negligence” contemplates something greater than ordinary negligence and is akin to recklessness. *People v. Riskey*, 206 Ill. 2d 403, 420 (2003). Culpable negligence is “negligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one’s actions.” *People v. Bocclair*, 202 Ill. 2d 89, 106 (2002) (citing Black’s Law Dictionary 1056 (7th ed. 1999)). The petitioner carries the burden of establishing that a delay in filing a post-conviction petition was not the result of his culpable negligence. *People v. VanHee*, 305 Ill. App. 3d 333, 336 (1999).

After this court affirmed the petitioner’s conviction and sentence, he filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on March 29, 2006. *People v. Rose*, 218 Ill. 2d 553 (2006). He did not file a petition for writ of certiorari to the United States Supreme Court, which would have been due 90 days thereafter, on June 27, 2006. See U.S. S.

Ct. R. 13. Therefore, the post-conviction petition was due six months after June 27, 2006, on December 27, 2006. The petitioner mailed a *pro se* petition for post-conviction relief to the trial court on January 17, 2007, 21 days after its due date.

Here, the petitioner concedes that he filed his post-conviction petition late. However, he alleges that the petition was only 21 days late because under the “mailbox rule” the petition should be considered filed as of the date the prisoner delivers that mail to his custodian for mailing. See *Houston v. Lack*, 487 U.S. 266 (1988). The State, however, argues that the trial court properly held that the post-conviction petition was filed on January 29, the date the court received it. According to the State, in order to invoke the “mailbox rule” to filings in the trial court, a defendant’s filings must comply with the requirements of Supreme Court Rule 12(b)(3). Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009). Under that rule, along with the post-conviction petition, the petitioner would have to have filed an affidavit stating the time and place of mailing, the complete address on the envelope and the fact that proper postage was prepaid. Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009).

We need not reach the merits of the parties’ argument regarding which date is the true filing date of the post-conviction petition because such a finding is not crucial to a determination of culpable negligence. As we have noted, both parties agree that the post-conviction petition was untimely filed. Therefore, we will turn to a discussion of whether the petitioner’s late filing constituted culpable negligence. See *People v. Hobson*, 386 Ill. App. 3d 221, 231 n. 2 (2008) (disagreement between the parties regarding whether the post-conviction petition was filed on the date the petitioner signed and notarized the petition three months late or the date it was filed by the circuit clerk five months late was irrelevant to a discussion of culpable negligence).

A careful review of the record indicates that the petitioner did not allege sufficient facts to show that the delay in filing was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West Supp. 2007). The facts alleged in the amended post-conviction petition, along with an exhibit attached thereto, indicate that the petitioner was specifically told that he could not abdicate his responsibility to file a timely post-conviction petition to PC Associates. Exhibit A is a letter from PC Associates to the petitioner dated May 20, 2006, wherein PC Associates promises to consult with the petitioner and assist with legal research and writing, but specifically states, “[T]he decision as to what is submitted to the court is entirely up to you. We are not attorneys and we do not and cannot represent you.” Even if the petitioner misunderstood this letter and believed that PC Associates was going to actually file his post-conviction petition, it is clear from the record that the petitioner knew by September 14, 2006, when he filed a motion to extend the time to file his post-conviction petition, that PC Associates had not prepared anything for him. In fact, he admitted in his affidavit in response to the State’s amended motion to dismiss his post-conviction petition that as of September 14, 2006, he knew that PC Associates was not going to prepare the petition and that he would have to proceed on his own. The motion to extend was denied on September 18, 2006. At that point the petitioner still had over three months in which to timely file his post-conviction petition.

We are also not persuaded by the fact that the petitioner is not culpably negligent in filing a post-conviction petition because the Circuit Court of Rock Island County found that the proprietors of PC Associates had engaged in the unlicensed practice of law. Again, PC Associates was very clear in their communication with the petitioner that the decision as to what to submit to the court was entirely up to the petitioner. PC Associates never made any representation that they would file the post-conviction petition, much less that they would do so

in a timely manner. Further, PC Associates made affirmative representations that they were not lawyers and could not represent the defendant. Finally, in the trial court's order denying the petitioner's request for an extension the court directed the petitioner to the time limitations provided in the Post Conviction Hearing Act. See 725 ILCS 5/122-1 (West Supp. 2007). Although it appears that the petitioner may have been confused about the date the post-conviction petition was due since he requested an extension to December 20, 2006, when the petition was not actually due until December 27, 2006, his ignorance of the deadline is not a reasonable excuse. *People v. Lander*, 215 Ill. 2d 577, 588-89 (2005) ("unfamiliarity with the Act's requirements does not show a lack of culpable negligence").

In *Lander*, the petitioner alleged that he received erroneous advice as to the filing deadline for his petition from a law clerk employed by the prison and several "jailhouse lawyers." *Lander*, 215 Ill. 2d at 587. The court held that the petitioner had not substantially shown that he was not culpably negligent for filing his petition late because he did not allege why he should have reasonably relied on the advice of these individuals, who were not trained in post-conviction matters. *Lander*, 215 Ill. 2d at 587-88. The petitioner alleges that *Lander* is different from the instant case because PC Associates were not "jailhouse lawyers" or other persons employed within the prison. Instead, they were a business in the community who held themselves out as legal experts, especially in the area of post-conviction petitions. We disagree. Like the petitioner in *Lander*, the petitioner here has not shown why he reasonably relied on PC Associates to prepare his petition, especially given the fact that: (1) PC Associates told him that they were not lawyers and would not submit a petition to the court; and (2) the petitioner knew at least three months before the filing deadline that PC Associates was not going to prepare a petition for him.

The petitioner alleges that this case is more similar to *People v. Rissley* (206 Ill. 2d 403 (2003)) than to *Lander* (*People v. Lander*, 215 Ill. 2d 577 (2005)). In *Rissley*, the court held that the petitioner was not culpably negligent for filing a late post-conviction petition when the petitioner relied on erroneous advice given to him by his counsel on direct appeal. *Rissley*, 206 Ill. 2d at 417-18. We are not persuaded. Relying on a licensed attorney who represented the petitioner on his direct appeal is very different from relying on a company that specifically advises its clients that they are not attorneys and will not submit court documents on a petitioner's behalf.

The petitioner also claims that he is not culpably negligent in filing his petition late because he had no access to the law library or legal materials from October 11, 2006, to November 14, 2006. As we have noted, the petitioner admitted that as of September 14, 2006 he knew that he would have to prepare a post-conviction petition on his own. Therefore, from that point forward, he had almost three and a half months in which to prepare his petition. Even subtracting the 34 days that he did not have access to his legal materials or the law library, the petitioner was still left with ample time in which to prepare a timely petition. See *People v. Van Hee*, 305 Ill. App. 3d 333, 337 (1999) (even though prison was in lockdown for the last few months before deadline, the petitioner did not adequately show that he could not have used the law library when the lockdown was not in effect). For these reasons, we find that the petitioner did not meet his burden of proving that the untimely filing of his post-conviction petition was not due to his culpable negligence.

Next, the petitioner argues that he was denied the reasonable assistance of post-conviction counsel when counsel failed to allege in the amended post-conviction petition that his mental deficiencies may have caused him to file his post-conviction petition late. Specifically,

he claims that post-conviction counsel should have made this allegation because: (1) he alleged in an affidavit that his mental state and medications caused him to have short term memory and concentration loss; and (2) monthly treatment reports from the Department of Corrections submitted during the time the petitioner should have been preparing this post-conviction petition indicate that he was persistently suffering from hallucinations, anxiety, tremors, depression and mood swings.

The right to counsel in post-conviction proceedings is wholly statutory and not mandated by the Constitution. Therefore, a defendant is entitled only to the level of assistance required by the Post Conviction Hearing Act (“Act”). *People v. Lander*, 215 Ill. 2d 577, 583 (2005). The Act only requires that post-conviction counsel provide a “reasonable level of assistance” to a defendant. *People v. Owens*, 139 Ill. 2d 351, 364 (1990).

In order to provide a reasonable level of assistance, post-conviction counsel must attempt to help his client avert dismissal on a basis other than the merits of his claims, including the untimeliness of his petition. *People v. Perkins*, 229 Ill. 2d 34, 47 (2007). Where a possible excuse is apparent, counsel must then ensure that it is adequately presented to the court. *Perkins*, 229 Ill. 2d at 47.

Illinois Supreme Court Rule 651(c) imposes specific obligations on post-conviction counsel to assure a reasonable level of assistance required by the Act. *Lander*, 215 Ill. 2d at 584; Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Rule 651(c) requires that the record show counsel has: (1) consulted with the defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights; (2) examined the record of the trial court proceedings; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the defendant’s

contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). This rule is mandatory, and may be shown by a certificate filed by post-conviction counsel. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)

The petitioner was not denied the reasonable assistance of post-conviction counsel in this case. Here, counsel reviewed the record and made two arguments in an attempt to overcome the petitioner's burden of proving that his untimely filing was not due to his culpable negligence. Based upon the information provided in the record, the petitioner's mental state and use of psychotropic medication was simply not a sufficient basis upon which to allege a lack of culpable negligence.

We find that the psychological evaluations which the trial court ordered to determine the petitioner's fitness to stand trial instructive when reviewing whether post-conviction counsel should have made an allegation that the petitioner's mental status prevented him from filing a post-conviction petition in a timely manner. The medical professionals that evaluated the petitioner all found him fit to stand trial. Further, Dr. Chiappetta described the petitioner as oriented in time, place and person, as having a rational appreciation of the nature of the charges against him, and being able to communicate with counsel and testify in a clear, coherent, relevant and linear fashion. In addition, the Department of Correction reports taken from the time frame that the petitioner should have been preparing his post-conviction petition indicate that while he was reporting hallucinations, anxiety, tremors, depression and mood swings, several therapy reports indicated that the petitioner appeared alert and oriented, had good eye contact with his therapists, had clear and concise speech, logical and goal-oriented thought processes and good insight and judgment. These are not the descriptions of an individual who was not culpably negligent in filing a late post-conviction petition due to the medication he was taking or his mental impairment. Accordingly, we find no error.

Sentencing

Next, petitioner contends that his sentence of natural life imprisonment should be reversed and this cause remanded for re-sentencing because Public Act 89—203 (Pub. Act 89—203, eff. July 21, 1995), which had made the sentence of natural life imprisonment mandatory, was struck down as unconstitutional for violating the single-subject rule of the Illinois Constitution. See *People v. Wooters*, 188 Ill. 2d 500, 520 (1999); 730 ILCS 5/5—8—1(a)(1)(c)(ii) (West 2002); Ill. Const. 1970, art. IV, § 8. Petitioner also contends that this sentencing provision has never been re-enacted.

A statute that violates the single-subject rule is void in its entirety. *People v. Quevedo*, 403 Ill. App. 3d 282, 298 (2010). Therefore, all of the amendment's provisions, including the specific provision under which defendant was sentenced, are void *ab initio* as if they had never been passed. *People v. Brown*, 225 Ill. 2d 188, 198-99 (2007). “The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment.” *People v. Gersch*, 135 Ill.2d 384, 390 (1990).

Here, the State confesses error and concedes that the provision under which petitioner was sentenced had been declared unconstitutional in *People v. Wooters*, 188 Ill. 2d at 520, and that it has never been re-enacted. We agree with the State that the statutory language mandating a term of natural life imprisonment under section 5—8—1(a)(1)(c)(ii) of the Unified Code of Corrections is void and that it has not been re-enacted after *Wooters*. *People v. Wooters*, 188 Ill. 2d 500, 520 (1999); 730 ILCS 5/5—8—1(a)(1)(c)(ii) (West 2002). Accordingly, we vacate petitioner's sentence and remand this cause for petitioner to be re-sentenced according to the law

that was in force before the adoption of the void statutory amendment. See *People v. Gersch*, 135 Ill. 2d 384, 390 (1990).

CONCLUSION

For the foregoing reasons, we affirm the trial court's order granting the State's motion to dismiss the post-conviction petition as untimely. We also vacate petitioner's void sentence and remand this cause for re-sentencing.

The judgment of the circuit court of Carroll County is affirmed; sentence vacated and cause remanded.

Affirmed; sentence vacated; cause remanded.