2012 IL App (4th) 100292-U

Filed 5/1/12

NO. 4-10-0292

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DARRELL D. SCATES,	)	No. 07CF238
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 Held: (1) The *pro se* postconviction petitioner under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)) was not entitled to have his petition advance to the second stage of postconviction proceedings based on the trial court's alleged failure to consider his postconviction petition within 90 days of its filing.

(2) The postconviction petition failed to state the gist of a constitutional claim he was denied the effective assistance of counsel when counsel did not request a fitness hearing before trial.

(3) This court, on appeal of the trial court's dismissal of defendant's postconviction petitions, lacks jurisdiction on appeal from the dismissal of defendant's postconviction petition to consider defendant's argument the trial court failed to comply with the orders on remand following his direct appeal.

¶ 2 In October 2008, defendant, Darrel D. Scates, filed his initial pro se petition under then Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), while a direct appeal of his convictions and sentences was pending. The trial court dismissed the petition,

mistakenly finding it lacked jurisdiction over the postconviction petition because of the pending direct appeal. Defendant filed notice of appeal, but did not further pursue the matter. In August 2009, in the direct appeal, this court remanded the case, ordering the trial court to consider defendant's motion for a new trial. During the March 2010 hearing on remand, the trial court reinstated defendant's October 2008 postconviction petition. In April 2010, the court found the petition, as well as a supplemental pro se postconviction petition, frivolous and patently without merit and dismissed it.

¶ 3 Defendant appeals, arguing (1) the trial court erroneously failed to rule on the merits of his petition within 90 days (see 725 ILCS 5/122-2.1(a) (West 2008)), (2) his petition states the gist of a constitutional claim he was denied his right to the effective assistance of counsel when counsel failed to request a fitness hearing, and (3) the court did not comply with this court's orders on remand in the direct appeal. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2008, a jury convicted defendant of three counts of threatening a public official (720 ILCS 5/12-9(a)(1)(i), (a)(2) (West 2006)). Following his convictions, defendant filed a pro se motion for a new trial, alleging counsel was ineffective on a number of grounds. Shortly thereafter, the trial court sentenced defendant to concurrent extended-term prison sentences of 12 years on each count, to be served consecutively to a sentence defendant was then serving. Defendant filed a direct appeal of his convictions and sentences. One of the arguments raised in his direct appeal was the court erroneously failed to inquire into his posttrial claim of ineffective assistance of counsel. People v. Scates, 393 Ill. App. 3d 566, 568, 914 N.E.2d 243, 244 (2009).

¶ 6 In October 2008, while defendant's direct appeal remained pending, defendant filed a pro se postconviction petition. In this initial petition, defendant alleged, in part, his trial counsel was ineffective for failing to seek a fitness hearing—the argument defendant raises in this appeal. One week after its filing, the trial court held it had "no jurisdiction to hear said motions at this time" while defendant's direct appeal was pending. The court ordered the postconviction petition "denied and stricken." Defendant filed a timely appeal of this denial of his postconviction petition. There is, however, no evidence in the record showing the appeal was transmitted to the appellate court or that defendant further pursued the appeal.

¶ 7 In August 2009, this court affirmed defendant's conviction, but remanded. Scates, 393 Ill. App. 3d at 572, 914 N.E.2d at 247. We ordered the trial court to reconsider defendant's pro se posttrial motion for a new trial and his ineffective-assistance-of-counsel claims. Scates, 393 Ill. App. 3d at 572, 914 N.E.2d at 247.

¶ 8 In January 2010, defendant filed his second pro se postconviction petition, arguing he was not proved guilty beyond a reasonable doubt because the alleged victim was not a public official.

¶ 9 On March 29, 2010, pursuant to this court's order on remand, the trial court held a hearing on defendant's posttrial motion for a new trial and denied the motion. At the same hearing, the trial court asked defendant if he wanted the court to reinstate his initial postconviction petition. The court ruled it would "reinstate" defendant's first postconviction petition "effective today" and asked defendant if he wanted to amend that petition. Defendant declined.

¶ 10 In his initial postconviction petition, defendant relied upon matters of record to

support his claim defense counsel was ineffective for failing to seek a fitness hearing: (1) the trial court's observation of his irrational behavior, (2) the court's awareness defendant was taking psychotropic medications, and (3) the fact a psychiatrist and psychologist testified at his hearings. Defendant did not specify when the trial court observed irrational behavior. On appeal, defense counsel highlights matters from the March 2008 sentencing hearing.

¶ 11 At the sentencing hearing, the court questioned the probation officer who noted in the presentence investigation report defendant had confessed to killing his stepfather, whom he and his brother allegedly killed because the stepfather sexually assaulted and killed their stepsister. The officer stated she had taken that information from a report by a mental-health provider from the Illinois Department of Corrections (DOC). The officer stated defendant's criminal history did not indicate defendant had been prosecuted for that offense. When the officer could not state whether this event occurred, the court continued the sentence hearing and directed the officer to learn more.

¶ 12 After the trial court stated it would continue the hearing, defendant told the court, "You ain't going to find it." Defendant stated he was not prosecuted for the offense after his stepfather's death. Defendant reported he was 13 at the time and living in Chicago Heights. The court asked how the stepfather's death was reported. Defendant replied as an accident. Defendant also stated the following: "[T]hey found him in the bed. He was in his bed asleep. That is how they found him. He did what he did, man. He just did what he did. I hate for it to happen, but that is what happened."

¶ 13 Before the sentencing hearing reconvened, defense counsel subpoenaed defendant's psychiatric records and the probation officer submitted a supplemental presentencing

report. In this report, the stepfather is referred to as a foster father. The Chicago Heights police department had no records to corroborate defendant's story.

¶ 14 The other evidence in his record defendant relies upon is the fact he was taking psychotropic medications and a psychologist and psychiatrist testified at the sentencing hearing. The presentence report references DOC medical records that indicate a psychiatrist, Melvin Koko, saw defendant in January 2008 for a medication review. Dr. Koko advocated following the same recommendations made by another psychiatrist who last saw defendant in November 2007. Defendant's diagnosis was the following: "Axis I: Impulse Control Disorder-Intermittent Explosive Disorder and Depressive Disorder NOS by history. Axis II: Antisocial Personality Traits by history." Defendant was to continue taking Celexa, Clonazepam, and Thorazine. At the sentencing hearing, both Dr. Koko and a psychologist agreed defendant suffered from antisocial personality disorder.

¶ 15 In April 2010, the trial court dismissed defendant's postconviction petitions. The court treated the second petition as a supplement to the first and found both frivolous and patently without merit.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant first contends the trial court, by not ruling on his October 2008 postconviction petition until April 2010, violated the Act's mandate to rule on postconviction petitions within 90 days of filing. See 725 ILCS 5/122-2.1(a) (West 2008). Defendant argues the trial court's decision was not timely, he is entitled to the appointment of counsel and having his petition advance to the second stage of proceedings under the Act. See *People v. Harris*, 224

Ill. 2d 115, 130, 862 N.E.2d 960, 970 (2007).

¶ 19 The State maintains the trial court timely ruled on defendant's initial postconviction petition which it denied for lack of jurisdiction one week after the petition was filed. The State argues that was a final decision which defendant appealed, but did not pursue. The trial court's decision at that time was erroneous, but that does not render the decision any less final.

¶ 20 At the first stage of postconviction proceedings, section 122-2.1(a) of the Act mandates a trial court, upon receiving a postconviction petition, examine that petition to ascertain whether the petition is frivolous and patently without merit within 90 days of the petition's filing. See 725 ILCS 5/122-2.1(a) (West 2008). If the court finds the petition is frivolous or patently without merit, it shall dismiss the petition. See 725 ILCS 5/122-2.1(a)(2) (West 2008). If, however, the trial court does not rule on the petition or dismiss it as frivolous and patently without merit within that 90-day time period, the trial court must order the petition docketed for further proceedings under the Act. See 725 ILCS 5/122-2.1(b) (West 2008).

¶ 21 The question arises whether a denial for lack of jurisdiction satisfies section 122-2.1's mandate the trial court consider whether a filed petition is "frivolous and patently without merit" within 90 days. We find it does. Lack of jurisdiction is a legal bar to a claim, as without jurisdiction a court has no power to consider the claim. See generally *In re M.W.*, 232 Ill. 2d 408, 414-15, 905 N.E.2d 757, 763 (2009). Our supreme court has found judicial findings of other legal bars to postconviction petitions, *i.e.*, *res judicata* and forfeiture, equates to findings such petitions were frivolous and patently without merit: "postconviction petitions dismissed on principles of forfeiture or *res judicata* are, necessarily, both frivolous and patently without

merit." *People v. Alcozer*, 241 Ill. 2d 248, 258, 948 N.E.2d 70, 77 (2011), citing *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 615-16 (2005). In reaching that decision, the court reasoned the definition of frivolous included "having no basis in *law* or fact." *Blair*, 215 Ill. 2d at 445, 831 N.E.2d at 616, quoting Webster's Third New International Dictionary 913 (1993) (emphasis in *Blair*).

¶ 22 Similarly, when a court finds it lacks jurisdiction over a postconviction petition, it is finding that petition has no basis in law and is frivolous. By denying defendant's initial postconviction petition on jurisdictional grounds, the trial court found the petition frivolous within 90 days. That decision was final. See 725 ILCS 5/122-2.1(a)(2) (2008) ("Such order of dismissal is a final judgment ***."); see generally *People v. Walker*, 395 Ill. App. 3d 860, 865, 918 N.E.2d 1260, 1264 (2009) ("[A] finding of a lack of jurisdiction that effectively ends the litigation is final and appealable.").

¶ 23 Both parties agree the trial court incorrectly dismissed defendant's postconviction petition on jurisdictional grounds. We concur. See *Harris*, 224 Ill. 2d at 128, 862 N.E.2d at 968 ("[T]here is no basis in either the Act's language or in this court's jurisprudence for the proposition that a postconviction proceeding may not proceed at the same time as a direct appeal."). However, defendant did not advance his appeal beyond filing the notice of appeal and does not argue any error by the trial court or this court prevented the appeal's advancement.

¶ 24 When the trial court on March 29, 2010, reinstated defendant's October 2008 postconviction petition that had been denied and stricken, defendant effectively refiled a previously stricken petition. The trial court found the petition frivolous and patently without merit on April 7, 2010, within 90 days. We note the court treated defendant's January 7, 2010,

pro se petition as a supplement to the October 2008 petition. Defendant does not challenge this treatment. Defendant is not entitled to have his petition advance for further postconviction proceedings under section 122-2.1(b) of the Act.

¶ 25 Defendant next argues his petition was erroneously dismissed because he stated the gist of a constitutional claim he was denied the effective assistance of counsel when his counsel failed to request a fitness hearing. Defendant alleged counsel failed to request the fitness hearing despite record evidence showing irrational behavior, psychotropic-medication consumption, and mental-health providers' involvement in the case.

¶ 26 The State may not prosecute a defendant who is unfit for trial without violating due process. People v. Easley, 192 Ill. 2d 307, 318, 736 N.E.2d 975, 985 (2000). We presume a defendant is fit for trial, but will consider a defendant to be unfit if defendant, due to his mental or physical condition, is unable to understand the nature and purpose of the proceedings against him or assist in his defense. 725 ILCS 5/104-10 (West 2008). A hearing as to a defendant's fitness to stand trial must be held "[w]hen a bona fide doubt of the defendant's fitness is raised." 725 ILCS 5/104-11(a) (West 2008).

¶ 27 As stated above, in the first stage of proceedings under the Act, a trial court considers whether the claims in a postconviction petition are frivolous or patently without merit. 725 ILCS 5/122-2.1(a) (West 2008). A defendant may survive this stage by presenting the gist of a constitutional claim. People v. Jones, 213 Ill. 2d 498, 504, 821 N.E.2d 1093, 1096 (2004). The threshold is low, requiring from a pro se defendant only "a modest amount of detail." Jones, 213 Ill. 2d at 504, 821 N.E.2d at 1096. When a defendant alleges the ineffective assistance of counsel, a trial court may not summarily dismiss the postconviction petition if it is arguable (1)

counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. People v. Hodges, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 28 To establish prejudice when a defendant claims counsel was ineffective for failing to request a fitness hearing, that " 'defendant must show that facts existed at the time of his trial that would have raised a bona fide doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense.' " People v. Burt, 205 Ill. 2d 28, 39, 792 N.E.2d 1250, 1258 (2001) (quoting Easley, 192 Ill. 2d at 318-19, 736 N.E.2d at 985). He will be entitled to relief " 'only if he shows that the trial court would have found a bona fide doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered.' " Burt, 205 Ill. 2d at 39, 792 N.E.2d at 1258-59 (quoting Easley, 192 Ill. 2d at 319, 736 N.E.2d at 985). Factors relevant to whether a bona fide doubt as to defendant's fitness exists include defendant's irrational behavior, demeanor, and prior medical opinion on defendant's competence to stand trial. Burt, 205 Ill. 2d at 39, 792 N.E.2d at 1259. We review dismissals of postconviction petitions de novo. People v. Collins, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002).

¶ 29 We find defendant has not stated the gist of a constitutional claim he was denied the effective assistance of counsel when counsel did not request a fitness hearing. Defendant does not assert or cite any evidence to show he was, because of a mental or physical condition, unable to comprehend the nature and purpose of the proceedings against him or help in his defense—the prerequisites of an unfitness finding (725 ILCS 5/104-10 (West 2008)). At best, he has shown he suffered mental-health conditions and was treated through medication for his condition. Such evidence does not help defendant. The fact an individual is taking psychotropic medication does not give rise to a bona fide doubt of fitness (see People v. Mitchell, 189 Ill. 2d

312, 331, 727 N.E.2d 254, 266-67 (2000)), and "[a] defendant can be fit for trial although his or her mind may be otherwise unsound" (Easley, 192 Ill. 2d at 320, 736 N.E.2d at 986)). Defendant has not shown " 'the trial court would have found a *bona fide* doubt of his fitness if it had been apprised of the evidence now offered.' " See Burt, 205 Ill. 2d at 39, 792 N.E.2d at 1258-59, quoting Easley, 192 Ill. 2d at 319, 736 N.E.2d at 985.

¶ 30 Defense counsel, on appeal, also cites defendant's allegations in a pro se post-trial motion he was diagnosed as a schizophrenic and placed in segregation as a result of numerous rule infractions attributed to a behavioral problem. These allegations are not convincing and are not supported by any documentary evidence. See 725 ILCS 5/122-2 (West 2008) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). The testimony by the mental-healthcare providers who diagnosed defendant and testified at defendant's sentencing hearing does not support these assertions and does not establish a lack of fitness.

¶ 31 The evidence does not show the trial court would have found a bona fide doubt of defendant's fitness. We find no error in the dismissal of defendant's postconviction petition.

¶ 32 Defendant last argues the trial court, on remand in the direct appeal, failed to consider all of his claims made in his *pro se* motion for a new trial. The State contends this court lacks jurisdiction on appeal from the dismissal of defendant's postconviction petition to consider challenges to the trial court's denial of a posttrial motion. We agree with the State.

¶ 33 This case was filed pursuant to the Act. Defendant filed two *pro se* postconviction petitions that were dismissed. Defendant filed notice of appeal for his "postconviction petition." We lack jurisdiction over matters not involving the postconviction

petition. See generally *People v. Jake*, 2011 IL App (4th) 090779, ¶24, 960 N.E.2d 45, 51 (2011) ("A notice of appeal provides a reviewing court with jurisdiction to consider only the judgments specified in the notice of appeal.").

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment. We grant the State its statutory assessment of $50 as costs of this appeal.

¶ 36 Affirmed.