2017 IL App (4th) 150332-U

NO. 4-15-0332

FILED
April 19, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Livingston County |
| ANTHONY L. WISSMILLER, | ) | No. 08CF205 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Jennifer H. Bauknecht, |
| | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court (1) affirmed the trial court's second-stage dismissal of defendant's postconviction petition and (2) vacated certain fines.

¶ 2 In March 2009, defendant pleaded guilty to aggravated driving under the influence of alcohol (aggravated DUI) and driving while license revoked. At a June 2009 sentencing hearing, the State recommended a sentence of 20 years in prison. The trial court sentenced defendant to 20 years' in prison.

¶ 3 Later that month, defendant filed a motion to withdraw his guilty plea, arguing that the State had agreed, as part of the plea agreement, to recommend a sentence of no more than 15 years. The trial court denied that motion. On direct appeal, defendant did not raise the issue of the State's breaching the plea agreement, but instead, he raised new issues concerning the propriety of his sentence. This court affirmed his sentence on September 14, 2010. *People v. Wissmiller*, No. 4-09-0742 (Sept. 14, 2010) (unpublished order under Supreme Court Rule 23).

¶ 4 In December 2012, defendant *pro se* filed a petition for postconviction relief. In it, he argued that the State's recommendation of 20 years' in prison violated his right to due process and that counsel's failure to object to that recommendation constituted ineffective assistance of counsel. The trial court eventually dismissed the petition at the second stage of postconviction proceedings, concluding that the petition was both untimely and meritless.

¶ 5 Defendant appeals, arguing that (1) the untimeliness of his petition was not due to his culpable negligence and (2) his petition established a substantial violation of his constitutional rights. Because we conclude that defendant's petition was untimely as a result of his culpable negligence, we affirm. In addition, defendant argues that the circuit clerk improperly imposed certain fines. We vacate the fines imposed by the circuit clerk.

¶ 6 I. BACKGROUND

¶ 7 A. The Guilty Plea and Direct Appeal

¶ 8 In August 2008, the State charged defendant with four counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(A), (G), (H), (I) (West 2008)) and one count of driving while license revoked (625 ILCS 5/6-303(a), (d-4) (West 2008)). (The State later dismissed the count of aggravated DUI predicated on lack of liability insurance. 625 ILCS 5/11-501(d)(1)(I) (West 2008)).

¶ 9 In March 2009, defendant pleaded guilty to the remaining three counts of aggravated DUI and one count of driving while license revoked.

¶ 10 At the June 2009 sentencing hearing, the State recommended a sentence of 20 years in prison for aggravated DUI and 5 years for driving while license revoked. Defense counsel recommended a sentence of six years in prison. The trial court sentenced defendant to 20 years in prison on the first aggravated DUI count and a concurrent term of 5 years for driving while license revoked.

¶ 11 Later that month, defendant filed a motion to withdraw his guilty plea and, in September 2009, an amended motion to withdraw his plea. The amended motion argued that the State had promised, as part of defendant's guilty plea agreement, not to recommend a sentence greater than 15 years and that the State violated that agreement by recommending 20 years. As a result, defendant requested that the trial court allow him to withdraw his plea of guilty or else reconsider his sentence.

¶ 12 In September 2009, the trial court conducted a hearing on defendant's amended motion to withdraw his guilty plea. Defendant testified that before he pleaded guilty in March 2009, defense counsel told him that, if he agreed to plead guilty, the State would agree not to recommend a sentence of more than 15 years in prison. Defendant testified further that the State's alleged promise was "a factor" in his pleading guilty.

¶ 13 At the conclusion of the hearing, the trial court denied defendant's amended motion to withdraw his plea. The court found, "I don't think there's any evidence at this point to support the defendant's contention that he pleaded guilty because he believed that the State would cap." The court noted that defendant had "every opportunity" to mention the State's promise when the court asked him during the guilty plea hearing if the State had promised him anything for pleading guilty. The court also denied defendant's request to reconsider his sentence.

¶ 14 On appeal, defendant did not argue that the State had breached its promise to recommend no more than 15 years in prison. Nor did he argue that trial counsel was ineffective for failing to object when the State recommended 20 years. Instead, defendant raised alternative arguments that his sentence was improper. This court rejected those arguments and affirmed defendant's sentence. *Wissmiller*, No. 4-09-0742 (Sept. 14, 2010) (unpublished order under Su-

preme Court Rule 23).

¶ 15 B. The Postconviction Petition

¶ 16 In December 2012, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant's petition raised the following three claims: (1) trial counsel was ineffective for failing to object when the State recommended 20 years at sentencing; (2) defendant's guilty plea was involuntary because the State did not uphold its end of the guilty plea agreement; and (3) appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective.

¶ 17 In January 2013, the trial court entered a written order summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 18 On appeal from the trial court's summary dismissal, this court reversed and remanded for further postconviction proceedings, determining that the petition stated the gist of a claim that the State violated the plea agreement by recommending 20 years. *People v. Wissmiller*, 2014 IL App (4th) 130128-U, ¶ 32.

¶ 19 On remand, the trial court appointed counsel, who filed an amended and a second amended petition for postconviction relief. Attached to the second amended petition was a letter dated September 16, 2008, addressed from Livingston County State's Attorney, Thomas J. Brown, to defendant's original counsel in this case, public defender James Casson. (Defendant later hired private counsel, Keith E. Yard.) In the letter, the State offered that, if defendant agreed to plead guilty to all the charged offenses, the State would recommend a sentence of 15 years. The letter also stated that the offer should not be considered final until it was executed and signed by all parties. (Defendant pleaded guilty in March 2009.)

¶ 20 The State filed a motion to dismiss defendant's second amended petition, arguing

that the petition was untimely and failed to make a substantial showing of a constitutional violation.

¶ 21 In April 2015, the trial court issued an oral decision granting the State's motion to dismiss defendant's second amended petition. The court determined that the petition was untimely and failed to establish a substantial constitutional violation. As to defendant's claim that trial counsel was ineffective for failing to object to the State's recommendation of 20 years' in prison, the court concluded that defendant failed to establish that he suffered prejudice. That is, the court found that defendant was "very likely to have gotten the 20-year sentence" even if the State had recommended merely 15 years.

¶ 22 Defendant appeals.

¶ 23 II. ANALYSIS

¶ 24 Defendant argues that (1) the trial court erred by granting the State's motion to dismiss his second amended postconviction petition and (2) the circuit clerk improperly imposed various fines. The State responds that the petition was correctly dismissed as both untimely and meritless. We agree that defendant's petition was untimely and that defendant has failed to establish that the untimeliness was not the result of his own culpable negligence. We therefore affirm the trial court's dismissal of defendant's postconviction petition. As to defendant's fines, we accept the State's concession that certain fines were improperly imposed by the circuit clerk. We therefore vacate those fines.

¶ 25 A. The Act

¶ 26 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a remedy for defendants whose convictions resulted from a substantial violation of their constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). The Act sets up a three-stage

process for adjudicating postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734, 740 (2002). In this case, defendant's petition was dismissed at the second stage of postconviction proceedings based on the trial court's determination that defendant's petition was untimely and meritless. When reviewing a second-stage dismissal, we accept as true all factual allegations that are not rebutted by the record and review the trial court's dismissal *de novo*. *People v. Johnson*, 2017 IL 120310, ¶ 14.

¶ 27 Section 122-1(c) of the Act provides, in relevant part, the following:

> "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 2012).

¶ 28 B. Was Defendant's Postconviction Petition Untimely?

¶ 29 Defendant argues that section 122-1(c) of the Act contains no deadline for filing a postconviction petition under the circumstances of this case, where defendant filed a direct appeal in this court but did not file a petition for leave to appeal to our supreme court.

¶ 30 Our supreme court recently addressed this precise legal issue in *Johnson*, 2017 IL

120310, ¶¶ 17-24. The *Johnson* court acknowledged that the plain language of section 122-1(c) contains no time limit for filing a postconviction petition in defendant's situation and therefore supports defendant's argument. However, relying on the legislative history of section 122-1(c), the court determined that such a reading was "at odds with the purpose of the statute." *Id.*, 2017 IL 120310, ¶ 21. The court therefore read into the statute an applicable time limit that existed in a prior version of the statute, which the legislature "omitted by oversight" from the current version. *Id.*¶ 24. That time limit provides that in cases such as this one, where the defendant filed a direct appeal to the appellate court but did not later file leave to appeal to the supreme court, a postconviction petition must be filed within six months of the deadline for filing leave to appeal. *Id.*

¶ 31 Our supreme court rules provide that a petition for leave to appeal must be filed within 35 days of the final judgment of the appellate court. Ill. S. Ct. R. 315(b) (eff. Feb. 26, 2010). In this case, the appellate court's judgment was entered on September 14, 2010. Defendant's petition for leave to appeal was therefore due on October 19, 2010. His postconviction petition was due six months later, on April 19, 2011. Defendant did not file his initial postconviction petition until December 12, 2012. His petition was therefore untimely.

¶ 32 C. Was the Untimeliness of Defendant's Postconviction Petition Due to His Culpable Negligence?

¶ 33 Defendant argues that despite the untimeliness of his petition, dismissal of his petition was inappropriate because the untimeliness was not due to his "culpable negligence." See 725 ILCS 5/122-1(c) (West 2012) (establishing that the time limits for postconviction petitions apply "unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence").

¶ 34 To excuse the untimeliness of a postconviction petition, the defendant has the

burden to demonstrate "an absence of culpable negligence in bringing" the petition. *People v. Boclair*, 202 Ill. 2d 89, 104, 789 N.E.2d 734, 743 (2002). The phrase "culpable negligence" describes "something greater than ordinary negligence and is akin to recklessness." *Id.* at 108, 789 N.E.2d at 745.

¶ 35 Defendant raises two arguments as to why his untimely petition did not result from his culpable negligence. Neither argument is persuasive.

¶ 36 First, defendant argues that he was not culpably negligent because he was proceeding *pro se* and was unaware of the timeliness requirements of section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2012)). In support of that argument, defendant claims that the timeliness requirements of section 122-1(c) were so complicated that no layman could understand them. Defendant notes that different districts of our appellate court reached different conclusions about the timeliness requirements in situations like his, where no petition for leave to appeal was filed. See *People v. Robinson*, 2015 IL App (4th) 130815, ¶ 22, 45 N.E.3d 273 (holding that section 122-1(c) of the Act contains no deadline when the defendant has not filed a petition for leave to appeal), *abrogated by Johnson*, 2017 IL 120310, ¶ 28; *People v. Wallace*, 406 Ill. App. 3d 172, 941 N.E.2d 436 (2010) (holding that the time limit when no petition for leave to appeal has been filed is six months from the due date for filing the petition for leave to appeal). In light of that disagreement within the appellate court, defendant argues that he, as a layman, was not culpably negligent for failing to properly interpret a complicated statute.

¶ 37 The supreme court essentially forestalled this argument in *Johnson*, 2017 IL 120310, ¶¶ 25-30. In that case, the defendant similarly argued that confusion about the timeline negated any culpable negligence on his part for failing to meet it. *Id.* ¶ 25. The *Johnson* court explained that "ignorance of the law or of one's legal rights does not provide an excuse for his

late filing." *Id.* ¶ 27. The *Johnson* court was not persuaded by the defendant's argument that the ambiguity surrounding section 122-1(c) excused his failure to meet the timeline. *Id.* ¶¶ 29-30. Nor are we.

¶ 38 Second, defendant argues that his lawyer incorrectly informed him of the deadline for filing his postconviction petition. Defendant is correct that reasonable reliance on a lawyer's erroneous advice about the time limit for filing a postconviction petition can establish a lack of culpable negligence. In *People v. Rissley*, 206 Ill. 2d 403, 795 N.E.2d 174 (2003), the supreme court held that the defendant was not culpably negligent for filing an untimely postconviction petition when his attorney informed him that the time limit for filing his petition was three years from the date of conviction when, in fact, the deadline was six months from the date the supreme court affirmed his conviction. The supreme court held that the "[d]efendant's conduct cannot fairly be labeled blamable or censorious, nor can it be said that defendant's actions evince an indifference to the consequences." *Id.* at 421, 795 N.E.2d at 184.

¶ 39 This case is distinguishable from *Rissley* and is more comparable to the facts of *People v. Hampton*, 349 Ill. App. 3d 824, 807 N.E.2d 1262 (2004). In *Hampton*, trial counsel did not inform the defendant that he could file a postconviction petition. When the defendant eventually realized that a postconviction petition was an option, the deadline for filing had passed. The petition that the defendant eventually filed was dismissed as untimely. The defendant, citing *Rissley*, argued that the untimeliness of his petition was not due to his culpable negligence. *Id.* at 825-26, 807 N.E.2d at 1263. The appellate court disagreed, distinguishing *Rissley* on the grounds that the Hampton defendant's attorney had not given him any erroneous advice concerning the deadline for filing a postconviction petition, whereas in *Rissley*, the defendant "had been affirmatively misled." *Id.* at 828, 807 N.E.2d at 1265. The court explained that the defendant was "in no

worse a position than the vast majority of *pro se* postconviction petitioners." *Id.* at 829, 807 N.E.2d at 1265.

¶ 40 Here, like in *Hampton*, defendant's lawyer gave him no affirmatively misleading advice about the applicable deadline for filing a postconviction petition. Defendant alleged that after the appellate court affirmed his conviction, his counsel wrote him a letter stating, "Your final option is to file a notice of appeal to the Illinois Supreme Court." We do not consider counsel's statement to be an erroneous explanation of defendant's postconviction opportunities. Instead, counsel's statement is reasonably construed as an explanation of defendant's remaining option regarding his direct appeal. Counsel was not obligated to inform defendant—particularly while defendant's direct appeal was still live—that he could file a postconviction petition alleging counsel's ineffective assistance. Unlike in *Rissley*, counsel's statement contained no incorrect advice about defendant's postconviction possibilities. As a result, counsel's statements do not constitute affirmatively misleading advice and therefore do not excuse defendant's culpable negligence.

¶ 41 D. Fines

¶ 42 Defendant argues that the circuit clerk improperly imposed the following assessments, which defendant describes as fines: (1) $5 "Automation" fine; (2) $3 "Document Storage" fine; (3) $130 "Court" fine; (4) $105 "Trauma Center" fine; and (5) $5 "Spinal Cord" fine.

¶ 43 Circuit clerks have the authority to impose a fee but lack authority to impose a fine, which is solely a judicial act. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 28. Any fines imposed by the circuit clerk are void. *Id.*

¶ 44 The State concedes that the following assessments imposed by the clerk were fines that are void and must be vacated: (1) $130 "Court" fine; (2) $105 "Trauma Center" fine;

and (3) $5 “Spinal Cord” fine.

¶ 45 The State argues that the $5 “Automation” and $3 “Document Storage” assessments were fees, not fines, and were therefore properly imposed by the circuit clerk. We agree. The document storage assessment is an adjustable assessment that defrays the document storage costs of prosecuting a particular defendant. It is therefore a fee. See *People v. Graves*, 235 Ill. 2d 244, 250, 919 N.E.2d 906, 909 (2009) (a fee compensates the State for the costs of prosecuting a defendant). Likewise, the automation fee is imposed to defray the expense “of establishing and maintaining automated record keeping systems in the offices of the clerks of the circuit court.” 705 ILCS 105/27.3a(1) (West 2008). Those record-keeping systems were used in the prosecution of defendant. The automation assessment is therefore a fee.

¶ 46 We vacate the (1) $130 “Court” fine; (2) $105 “Trauma Center” fine; and (3) $5 “Spinal Cord” fine. Although these fines were mandatory, we do not remand for the trial court to impose them. See *Daily*, 2016 IL App (4th) 150588, ¶ 30 (remanding for imposition of fines would impermissibly increase defendant’s sentence on appeal). Instead, because these fines have been paid by defendant, we order the trial court to refund defendant $240.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we vacate the enumerated “Court,” “Trauma Center,” and “Spinal Cord” fines but otherwise affirm the trial court’s judgment.

¶ 49 As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 50 Affirmed in part and vacated in part.