

NOTICE

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2013 IL App (5th) 120174-U

NO. 5-12-0174

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 03-CF-142
)	
WILLIS PARRAM,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Spomer and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant failed to show that he was not culpably negligent for filing his postconviction petition beyond the limitations period where he had sufficient access to the prison law library to prepare his petition in a timely manner. The defendant's counsel provided reasonable assistance by amending his *pro se* postconviction petition and alleging facts to attempt to overcome the procedural bar of untimeliness.

¶ 2 Following a jury trial, the defendant, Willis Parram, was convicted of first-degree murder and sentenced to 30 years' imprisonment. He filed a direct appeal and his conviction and sentence were affirmed. He subsequently filed a postconviction petition. The State filed a motion to dismiss the petition as untimely, which was granted. The defendant filed a timely notice of appeal. We affirm.

¶ 3 **BACKGROUND**

¶ 4 In December 2005, the defendant was tried for the first-degree murder of Thaddeus Hardin. The evidence at trial established that the defendant, Traveon

Hunter, and Montez Artis attended a party at the home of Mary Berry. Partygoer Hardin asked Artis for a cigarette, and Artis said he would "short him one," meaning Hardin was to smoke only half of the cigarette and return the remainder to Artis. Hardin smoked the entire cigarette, angering Artis. Hardin left Berry's home and Artis left with the defendant and Hunter shortly thereafter. Artis drove to his home, retrieved a .38-caliber revolver, and cruised the neighborhood until he spotted Hardin walking near Berry's apartment. Artis exited his vehicle, spoke to Hardin, and shot him once in the head and four times in the body. Artis got back in his car, opened the glove box, took out a .22-caliber semiautomatic pistol, and gave it to the defendant, telling him, "[I]f you don't finish him off, I'm going to finish you off." The defendant got out of the car and shot Hardin multiple times in the head as he was attempting to crawl away.

¶ 5 The defendant made two videotaped statements that were shown to the jury in which he admitted to the above facts. At trial, the defendant, his mother, and his brother's girlfriend each testified that the defendant was at his mother's home at the time of the offense. The defendant asserted that the police had compelled him to incriminate himself by punching him, badgering him, and threatening to take away his mother's other children if he did not confess to committing the murder. The interviewing officer and the videographer testified that the defendant had not been brutalized or coerced to give his confession. The jury found the defendant guilty of first-degree murder. The defendant filed a motion for a new trial. At the sentencing hearing on February 17, 2006, the motion was denied, and the defendant was sentenced to 30 years' imprisonment.

¶ 6 The defendant appealed. He argued that his sentence was excessive. Alternatively, he alleged that the trial court failed to properly admonish him pursuant

to Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001). This court found that the defendant raised sentencing issues on appeal that were no different than those he would have raised before the trial court on remand. This court addressed the sentencing-related issues, thus eliminating any prejudice as a result of the trial court's arguably inadequate admonishments. This court held that the trial court examined and balanced the factors in aggravation and mitigation, considered the information set forth in the presentence report, and formulated an appropriate sentence to punish as well as rehabilitate the defendant. It affirmed the defendant's conviction and sentence. *People v. Parram*, No. 5-06-0138 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 On August 27, 2009, the defendant filed a *pro se* postconviction petition. He argued that the State engaged in prosecutorial misconduct when it made several improper arguments in closing. He further alleged that his trial counsel was ineffective for failing to object during the State's closing argument, and appellate counsel was ineffective for failing to brief these issues on appeal. The trial court found that the defendant had stated the gist of a constitutional claim and appointed counsel to represent him.

¶ 8 On April 23, 2010, the defendant filed an amended petition for postconviction relief. On December 8, 2010, the defendant filed a second amended petition for postconviction relief. The defendant's appointed counsel reasserted his *pro se* postconviction claims and added the two claims he argued on direct appeal. Additionally, the defendant alleged that the delay in filing the postconviction petition was not due to his culpable negligence. He attached an affidavit in which he swore that the Menard Correctional Center, where he was incarcerated, had been on lockdown for lengthy periods of time, preventing him from accessing the law library

for the periods of time necessary to prepare his postconviction petition. He stated that he had only a seventh-grade education and that with the limited access to the law library, he could not prepare his postconviction petition until August 29, 2009. He also attached a list of dates from the Department of Corrections that the Menard Correctional Center was on lockdown between December 13, 2005, and August 27, 2009. There was no detail in the petition, the affidavit, or the list of lockdown dates specifying in which wing the defendant was housed.

¶ 9 On January 31, 2012, the State filed a motion to dismiss the defendant's second amended postconviction petition. It argued that the defendant's postconviction petition was untimely filed and that the untimeliness was due to his culpable negligence. The State asserted that the defendant's affidavit and the record of lockdown dates from Menard Correctional Center did not establish which lockdowns the defendant was involved in, and that the report did not show a sufficient amount of time in lockdown to deprive him of an opportunity to timely file his petition. The State further argued that the defendant's allegations were waived because they were available for consideration on direct review. The State asserted that there was no prosecutorial misconduct and that counsel's decisions were a matter of trial strategy. The State argued that appellate counsel was not ineffective because counsel is not required to raise every conceivable issue on appeal, and the defendant did not make any allegations regarding his trial that would have had any effect on the outcome of the trial. Finally, the State argued that the defendant "was convicted at trial by a mountain of evidence" and the defendant's allegations did not surmount this overwhelming evidence.

¶ 10 On March 21, 2012, the defendant's postconviction counsel filed a Rule 651(c) certificate swearing that he examined the entire record of the proceedings at trial,

made any amendments to the defendant's *pro se* postconviction petition that were necessary for adequate presentation of his contentions, and consulted with the defendant on numerous dates.

¶ 11 At the hearing on its motion to dismiss, the State argued that the defendant filed his postconviction petition significantly after the deadline. It asserted that while the defendant provided documentation regarding the dates the Menard Correctional Center was on lockdown, he did not provide information about what cellblock he was in or whether he caused the lockdowns. The State further argued that all of the defendant's allegations could have been raised on appeal except for his claim of ineffective assistance of appellate counsel. The trial court found that the defendant's postconviction petition was untimely and that the delay was due to his culpable negligence. It granted the State's motion to dismiss for that reason "as well as the reasons set forth in the petition filed by [the State] as well as the arguments that [the State has] presented in court." The defendant filed a timely notice of appeal.

¶ 12 ANALYSIS

¶ 13 The defendant argues that the trial court erred in dismissing his postconviction petition as untimely at the second stage because his claim that the delay in filing was not due to his culpable negligence created a question of fact that required an evidentiary hearing. "The trial court's findings of fact regarding a defendant's culpable negligence will be reversed only if they were manifestly erroneous, but the ultimate conclusion of whether the established facts demonstrate culpable negligence is subject to a *de novo* review." *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008).

¶ 14 The Post-Conviction Hearing Act (the Act) provides a means by which a

defendant may challenge his conviction or sentence for violations of constitutional rights. *People v. Wheeler*, 392 Ill. App. 3d 303, 307 (2009). Adjudication of a postconviction petition follows a three-stage process. *Id.* At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition survives the first stage, counsel may be appointed for an indigent defendant. 725 ILCS 5/122-4 (West 2008). Counsel must consult with the defendant, examine the record, and amend the petition as necessary to ensure that the defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). After defense counsel has made any necessary amendments, the State may move to dismiss the petition. *Wheeler*, 392 Ill. App. 3d at 308. If the State moves to dismiss, the trial court may conduct a dismissal hearing. *Id.* All well-pleaded facts are to be taken as true, and the trial court is foreclosed from engaging in any fact finding at the dismissal hearing. *Id.* If the trial court denies that motion to dismiss or if the State chooses not to file a dismissal motion, the State must answer the petition. 725 ILCS 5/122-5 (West 2008). The proceedings then advance to the third-stage evidentiary hearing. 725 ILCS 5/122-6 (West 2008).

¶ 15 "The issue of timeliness is first considered by the trial court at the second stage." *Wheeler*, 392 Ill. App. 3d at 308. If a defendant files a petition outside the limitations period, he must allege facts showing that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2008). In the instant case, the defendant concedes that his postconviction petition was untimely, but argues that the delay in filing was not due to his culpable negligence. He provided an affidavit swearing that lockdowns at the Menard Correctional Center where he was confined had deprived him of access to the law library and a meaningful opportunity to

research and draft his petition. The defendant also provided the Menard Correctional Center lockdown records from December 13, 2005, through August 27, 2009. The State did not rebut the defendant's assertion that parts of the prison were on lockdown on those dates. The State questioned whether the defendant was affected by the lockdowns reported and whether his actions may have contributed to the lockdowns. The defendant argues that when the State questioned the defendant's location within the Menard Correctional Center as well as which lockdown dates applied to him, it raised a factual question that should have been determined at a third-stage evidentiary hearing.

¶ 16 There is no need for an evidentiary hearing because the facts are undisputed. The State did not argue that parts of the correctional center were not on lockdown on those particular dates. It argued that the defendant should have provided more detailed information about the lockdowns. However, taking all well-pleaded facts as true, the defendant failed to establish that he was not culpably negligent in filing his postconviction petition beyond the limitation period.

¶ 17 "Freedom from culpable negligence is very difficult for a defendant to establish." *People v. Tooley*, 328 Ill. App. 3d 418, 421 (2002). A defendant's allegation that he was deprived of access to a law library is insufficient to prove lack of culpable negligence. *Id.* Total denial of access to the prison law library during a lockdown may sometimes excuse a late filing. *People v. Cortez*, 338 Ill. App. 3d 122, 131-32 (2003). However, a defendant who has some access to the library during the period in which he must file must also show that he was deprived of a meaningful opportunity to prepare the petition in order to establish that he lacked culpable negligence in failing to timely file his petition. *Id.* In the instant case, the Menard Correctional Center was not on continuous lockdown. Based on the records provided

by the Illinois Department of Corrections, which were attached to the defendant's petition, there were substantial periods of time when no division of the Menard Correctional Center was on lockdown. Thus, even assuming that the defendant was involved in every prison lockdown, he had sufficient time during the relevant period in which to access the law library and file a timely postconviction petition. Other than the dates that the facility was on lockdown, the defendant did not allege any additional facts to show he was deprived of a meaningful opportunity to prepare his postconviction petition. Given the facts, the defendant had sufficient access to the law library to prepare his postconviction petition in a timely manner. The trial court correctly determined that the defendant's failure to timely file his postconviction petition was due to his culpable negligence.

¶ 18 The defendant argues that his postconviction counsel provided unreasonable assistance because he failed to attempt to overcome the procedural bar of untimeliness. Postconviction counsel must provide assistance amending the defendant's postconviction petition to allege any available facts showing that a delay in filing was not due to the petitioner's culpable negligence. *People v. Perkins*, 229 Ill. 2d 34, 48 (2007). The defendant argues that his postconviction counsel failed to specify what division at the Menard Correctional Center he was housed in and what dates his division was on lockdown. He argues that the State built its motion to dismiss around this lack of specificity by arguing that the defendant's affidavit and the correctional center records did not establish that the defendant was involved in the reported lockdowns or whether he was responsible for the lockdowns. The defendant argues that his counsel should have stated what cellblock he was housed in, what dates his division was on lockdown, and what dates he was allowed to visit the law library. The defendant argues that his counsel's failure to provide such information

showed unreasonable assistance in his attempt to overcome the procedural bar of timeliness that stood between him and a review of the issues in his petition.

¶ 19 There is no constitutional right to the assistance of counsel in postconviction proceedings. *People v. Schlosser*, 2012 IL App (1st) 092523. The right to postconviction counsel is statutory (see 725 ILCS 5/122-4 (West 2008)), and defendants are entitled only to the level of assistance provided by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). The Act requires counsel to provide reasonable assistance to a defendant in postconviction proceedings. *Id.* Supreme Court Rule 651(c) outlines the specific duties of appointed counsel in postconviction proceedings. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Counsel's duties include consulting with the defendant to ascertain his contentions of deprivation of constitutional rights, examining the record of the proceedings at trial, and making any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). "An adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted." *Perkins*, 229 Ill. 2d at 44. Counsel must provide assistance in amending the petition to allege any available facts showing a delay in filing was not due to the defendant's culpable negligence. *Id.* at 48.

¶ 20 In the instant case, the defendant filed a *pro se* postconviction petition on August 27, 2009. On September 4, 2009, the trial court ruled that his petition stated the gist of a constitutional claim and appointed counsel to assist the defendant. On April 23, 2010, the defendant, with the assistance of counsel, filed an amended petition for postconviction relief in which he stated that if there was any delay in the filing of the *pro se* postconviction petition it was not due to his negligence. Attached

to the petition was an affidavit from the defendant in which he stated that the prison where he was incarcerated had been on lockdown for lengthy periods of time over the past three years, making it difficult to gain access to the law library and preventing him from preparing his petition for postconviction relief until August 2009. On December 8, 2010, he filed a second amended petition for postconviction relief. Attached to this motion was an affidavit from the defendant stating: "The Menard Correctional Center, where I am incarcerated, has been on lockdown for lengthy periods of time over the past three years, making it impossible for me to use the law library for the time that I needed to find the Post Conviction Hearing Act, to read and understand the Post Conviction Hearing Act, and to prepare a Petition for Post Conviction Relief that met the requirements of the Act. The frequent lockdowns deprived me of meaningful opportunity to prepare and file my Petition for Post-Conviction Relief." In his affidavit, the defendant also stated, "Because I could not gain access to the law library for the periods of time that I needed to prepare my Petition for post Conviction relief, it took me until August 29, 2009 to prepare and filed [*sic*] my Petition for Post-Conviction Relief." A list from the Illinois Department of Corrections of the dates and the areas of the Menard Correctional Center on lockdown from December 13, 2005, through August 27, 2009, was also attached to the petition.

¶ 21 The defendant's postconviction counsel did provide reasonable assistance. In his Rule 651(c) certificate of compliance he swore that he examined the entire record of proceedings, he consulted with the defendant by correspondence to ascertain his contentions of deprivation of constitutional rights, he consulted with him personally on February 5, 2010, to ascertain his contentions of deprivations of constitutional rights, and he amended the *pro se* postconviction petition for adequate presentation

of the defendant's contentions. He amended the petition to allege that the delay in filing the postconviction petition was not due to any culpable negligence on the part of the defendant. He attached an affidavit from the defendant and a record from the Illinois Department of Corrections listing the dates that the Menard Correctional Center was on lockdown. He alleged that the defendant had limited access to the law library.

¶ 22 The defendant argues that his postconviction counsel should have provided information about what cellblock he was housed in and the dates it was on lockdown. This information does not matter. The correctional center records showed that there were substantial periods in which no cellblock in the Menard Correctional Center was on lockdown during the relevant time period. The defendant further argues that his postconviction counsel should have provided information about the dates he was allowed to visit the law library. The prison law library may not have maintained records of when each prisoner had access to the library for the relevant period of time and, even if it did, these records may not have helped the defendant. The defendant was not deprived of all access to the law library. His counsel argued that he had limited access to the law library and provided an affidavit from the defendant stating that as a result of his level of education and limited access he was deprived of a meaningful opportunity to prepare his postconviction petition in a timely manner. The limited access the defendant had to the law library was sufficient to prepare a postconviction petition. Postconviction counsel attempted to overcome the procedural bar of untimeliness and provided reasonable assistance to the defendant.

¶ 23 The defendant failed to show that he was not culpably negligent for filing his postconviction petition beyond the limitations period. There were substantial periods

of time that no division of the Menard Correctional Center was on lockdown. The defendant had sufficient access to the law library to prepare a postconviction petition in a timely manner. The defendant's counsel provided reasonable assistance by amending his postconviction petition and alleging facts to attempt to overcome the procedural bar of untimeliness.

¶ 24

CONCLUSION

¶ 25

For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

¶ 26

Affirmed.