

NOTICE

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2019 IL App (5th) 150427-U

NO. 5-15-0427

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
Respondent-Appellee,)	St. Clair County.
)	
v.)	No. 10-CF-320
)	
LASON ELLIOTT, ¹)	Honorable
)	John Baricevic,
Petitioner-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Cates and Barberis* concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order dismissing the petitioner's postconviction petition is reversed and remanded for a continuation of second-stage proceedings where the petition was not untimely pursuant to the mailbox rule (Ill. S. Ct. Rs. 373, 12(b)(4) (eff. Sept. 19, 2014)).

¶ 2 The petitioner-appellant, Lason Elliott, appeals the dismissal of his petition for postconviction relief from the circuit court of St. Clair County on September 28, 2015. He

¹The defendant's name appears as both "Elliot" and "Elliott" in the record. The defendant's name appears as "Elliott" in various *pro se* documents in the record, and we adopt that spelling for purposes of our decision.

*Justice Goldenhersh was originally assigned to participate in this case. Justice Barberis was substituted on the panel subsequent to Justice Goldenhersh's retirement and has read the briefs and listened to the recording of oral argument.

asserts that the trial court erred in dismissing his petition as untimely. We agree, and reverse and remand the cause for a continuation of second-stage postconviction proceedings.

¶ 3 The facts of the petitioner's trial and conviction were detailed by this court on direct appeal. See *People v. Elliot*, 2013 IL App (5th) 110315-U. Therefore, this court will only state the facts relevant to this postconviction petition.

¶ 4 On November 5, 2014, the trial court received the petitioner's *pro se* postconviction petition, which was subscribed and sworn before notary public Jennifer Clendenin. She signed and dated the subscription as the "21st day of October, 2014." The "21st" and "October" were handwritten in fill-in-the-blank spots.

¶ 5 Attached to the petition was a "proof/certificate of service" form, attesting that:

"On October 20th, 2014, I have filed with the U.S. Mail through the Menard Correctional Center the following documents, properly addressed to the parties above: Kahalah Clay, Clerk of the Circuit Court [of] St. Clair County, [and] Mr. Brendan Kelly, State's Attorney.

I further declare, under penalty of perjury, that I am the Plaintiff in the above action, that I have read the above documents, and that the information contained therein is true and correct. 28 USC 1746 and 18 USC 1621."

The "October 20th" and "14" of 2014 were handwritten in fill-in-the-blank spots. The certificate was subscribed and sworn before Clendenin, who signed and dated the subscription as "the 8 day of Oct., 2014." The "8," "Oct.," and "14" of 2014 were written in fill-in-the-blank spots.

¶ 6 On November 17, 2014, the trial court entered an order stating that, "as this court is required to accept affidavits as true at this stage of a postconviction petition[,] I find there is a gist of a constitutional claim raised." The court appointed postconviction counsel and ordered the petitioner to file an amended petition within 120 days.

¶ 7 The petitioner's postconviction counsel filed an amended petition for relief on June 11, 2015. The State filed a motion to dismiss the amended petition on August 13, 2015, arguing, among other things, that the *pro se* petition was untimely because the trial court received it on November 5, 2014, seven days after the October 29, 2014, filing deadline. The State asserted that the petitioner failed to comply with Illinois Supreme Court Rule 12(b)(4) (eff. Sept. 19, 2014) because his certificate of service attached to the *pro se* petition attested to a date of mailing (October 20, 2014) occurring 12 days after the certificate was allegedly notarized (October 8, 2014). It argued that the certificate of service was not properly notarized and, therefore, was invalid. It noted that the alleged mailing date of October 20, 2014, cannot be correct, as the petitioner's *pro se* petition was notarized on October 21, 2014, and was included in the same filing. It concluded that the petitioner's certificate of service was defective and that the date that the *pro se* petition was mailed could not be accurately determined. Thus, the date that the *pro se* petition was filed—November 5, 2014—was an untimely filing date.

¶ 8 A hearing was held on the State's motion on August 19, 2015. The State argued that there were "significant issues as to timeliness" because the service affidavits and mailing dates did not line up. It stated that the notarization was invalid because it occurred before the date that the certificate of service was allegedly placed in the mail, and "how a notary could attest to something that happened sometime in the future is unclear." After the petitioner advised the trial court that there were communication issues between him and his counsel, the court rescheduled the case for a status hearing so that postconviction counsel and the

petitioner could discuss the case. It advised the parties that they would have 30 days to file additional briefs or exhibits.

¶ 9 The petitioner's postconviction counsel submitted a brief in support of the amended petition on September 11, 2015. It explained that the petitioner's postconviction petition was due by October 29, 2014, and that he submitted his request and authorization for payment to the Illinois Department of Corrections at Menard Correctional Center for his petition to be mailed on October 25, 2014. It also stated that any delay in the filing of his *pro se* petition was not due to his culpable negligence but was a delay on the part of the Department of Corrections in complying with his request. Attached to the brief was an "offender authorization for payment" form (postage payment form), which the petitioner had signed and dated October 25, 2014. The form was stamped "LEGAL/PRIVILEGED MAIL" and dated October 28, 2014.

¶ 10 The State filed a supplemental brief in support of its motion to dismiss on September 18, 2015. It stated that the petitioner's filing was untimely unless he satisfied Illinois Supreme Court Rule 373 (eff. Sept. 19, 2014),² which required that, if a filing is received after its due date, the time of mailing shall be deemed the time of filing, and proof of mailing "shall be as provided in Rule 12(b)(3)";³ thus, he was required to file an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was

²The current language of Rule 373 states that "[p]roof of mailing shall be as provided in Rule 12," omitting its reference to a specific subsection. See Ill. S. Ct. R. 373 (eff. July 1, 2017).

³The September 19, 2014, amendment to Rule 12(b) inserted new paragraph (b)(4) and renumbered former paragraphs (b)(4) and (b)(5) as (b)(5) and (b)(6), respectively. See Historical Notes, Ill. S. Ct. R. 12 (eff. Sept. 19, 2014). As we discuss below, the State concedes that, although Rule 373 specifically cites subsection (3), subsection (4) clearly states its applicability to *pro se* petitioners and, thus, to the petitioner in this case.

prepaid. The State explained that because the petitioner missed the filing deadline, in order for him to receive the benefit of Rule 12(b), also known as "the mailbox rule" (having the date he dropped his petition in the prison mail counted as his filing date), he was required to include an affidavit that complied with Rule 12(b). However, because his certificate of service contained a null-and-void notarization, it was invalid, and the trial court should dismiss the noncompliant petition as untimely. It also argued that the petitioner's postage payment form undermines the truthfulness of his averment in his certificate of service because it swore that he placed his petition in the prison mail system on October 20, 2014, but "this statement is patently false because the [postage payment] form shows that postage payment was not authorized until at least October 28, 2014."

¶ 11 On September 28, 2015, the trial court granted the State's motion to dismiss, stating:

"After consideration of arguments made orally and the written briefs, the motion to dismiss the postconviction petition is granted.

The petitioner has not complied with Supreme Court Rules for filing and alleges that failure was due to delay caused by the Dept. of Corrections. However[,] his exhibit contradicts his argument. The exhibit indicates his request for mailing was made after the filing deadline.

With the above ruling[,] I need not rule on the merits of his claim."

The petitioner appeals.

¶ 12 The Post-Conviction Hearing Act provides a three-step process for defendants who claim a deprivation of constitutional rights to make a collateral attack on the judgment. 725 ILCS 5/122-1 (West 2014). At the first stage, the trial court independently reviews and assesses a defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court must summarily dismiss it. *Id.* § 122-2.1(a)(2); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the petition is not

summarily dismissed by the court, it advances to the second stage. *People v. Kelly*, 2012 IL App (1st) 101521, ¶ 22. In the second stage, the State may move to dismiss a defendant's petition, or answer the allegations raised therein. 725 ILCS 5/122-4, 122-5 (West 2014). If that motion is denied, the State must answer the petition, and, barring the allowance of further pleadings by the court, the proceeding then advances to the third stage, a hearing wherein the defendant may present evidence in support of the petition. *Id.* § 122-6; *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006).

¶ 13 The second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). When reviewing a motion to dismiss at this stage, we accept as true all factual allegations that are not positively rebutted by the record. *Id.* at 586.

¶ 14 On appeal, the petitioner argues that the trial court erred by dismissing his petition as untimely because he is entitled to the benefit of the mailbox rule. He argues that the certificate of service is valid because the date is a mere typographical error, and the record shows that the prison's mailing system had physical custody of the petition, at the latest, on October 28, 2014. He also asserts that, even if the petition was untimely, he lacked culpable negligence for its untimeliness.

¶ 15 The State responds that the petitioner is not entitled to avail himself of the mailbox rule because the certificate of service is invalid. It argues that his notarized certificate of service was defective because the notarization date was approximately two weeks before the purported mailing date. It also asserts that the postage payment form cannot serve as a substitute for the defective certificate of service.

¶ 16 We begin by examining the requirements set out in the supreme court rules that were in effect in October of 2014.

¶ 17 Rule 373 stated that, if a filing is received after its due date, the time of mailing shall be deemed the time of filing. Ill. S. Ct. R. 373 (eff. Sept. 19, 2014). In that event, proof of mailing "shall be as provided in Rule 12(b)(3)." *Id.* At the time of the petitioner's filing in this case, Rule 12 changed several times in a short time span. Thus, although Rule 373 cited specifically to subsection (b)(3) of Rule 12, the petitioner and the State agree that, when then-Rule 12 is read as a whole, it is apparent that the operative rule for the petitioner was Rule 12(b)(4),⁴ which provided that service of *pro se* documents mailed by inmates could be proved "by affidavit, or by certification as provided in section 1-109 of the Code of Civil Procedure [(Code)] (735 ILCS 5/1-109 (West 2012)) of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered." Ill. S. Ct. R. 12(b)(4) (eff. Sept. 19, 2014).⁵ Thus, Rule 12(b)(4) invited a *pro se* petitioner to prove service by mail either by affidavit or by certification pursuant to section 1-109 of the Code. *Id.*

¶ 18 An affidavit requires a written oath sworn before an authorized person. *People v. Smith*, 22 Ill. App. 3d 377, 380 (1974) ("An affidavit is simply a declaration, on oath, in

⁴At the time of the petitioner's filing, Rule 12(b)(3) stated that "in case of service by mail or by delivery to a third-party commercial carrier, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail or delivered the document to a third-party commercial carrier, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage or the delivery charge was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Sept. 19, 2014).

⁵The current provision of Rule 12 provides that "in case of service by mail by a self-represented litigant residing in a correctional facility, by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered." Ill. S. Ct. R. 12(b)(6) (eff. July 1, 2017).

writing[,] sworn to before some person who has authority under the law to administer oaths."); *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493-94 (2002) ("an affidavit must be sworn to, and statements in a writing not sworn to before an authorized person cannot be considered affidavits"). However, section 1-109 provides that whenever the Code requires a document to be "sworn to or verified under oath," then verification under penalty of perjury is an acceptable substitute. 735 ILCS 5/1-109 (West 2014) ("Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath."). Thus, compliance with Rule 12(b)(4) pursuant to section 1-109 did not require notarization.⁶

¶ 19 Applying the rules to this case, the petitioner's certificate of service complies with Rule 12(b)(4). It includes "the time and place of deposit and the complete address to which the document was to be delivered" by stating that on October 20, 2014, the petitioner filed his petition with the U.S. Mail through the Menard Correctional Center and addressed it to the St. Clair County circuit court clerk and the state's attorney. It complies with section 1-109 by his averment that, "I further declare, under penalty of perjury, that I am the Plaintiff in the above action, that I have read the above documents, and that the information contained therein is true and correct." Due to its compliance with Rule 12(b)(4) via section 1-109 of the Code, the certificate of service is facially valid. Thus, the certificate of service's notarization, and thereby, the date that was handwritten by the notary on it, is of no

⁶Recent additions to its text make the legislature's intent abundantly clear. The current provision explicitly adds that "there is no further requirement that the pleading, affidavit, or other document be sworn before an authorized person." See 735 ILCS 5/1-109 (West 2018) (amended by Pub. Act 100-1086, § 5 (eff. Jan. 1, 2019) (2018 Ill. Legis. Serv.)).

consequence to our analysis, and the State's reliance on *People v. Tlatenchi* is misplaced. See *People v. Tlatenchi*, 391 Ill. App. 3d 705, 716 (2009) (concluding that defendant's proof of service, attached to her motion to withdraw her guilty plea, failed to comply with the affidavit requirements of Rule 12(b)(3) (eff. Nov. 15, 1992) and verification pursuant to section 1-109 of the Code was not a proper substitute).

¶ 20 However, in oral argument before this court, the State clarified that the reason that the petitioner's certificate of service was invalid was not because of the null-and-void notarization but because the certificate of service was patently false. It points out that the notary's handwritten date on the petitioner's postconviction petition—October 21, 2014—was a day after the petitioner's handwritten date on his certificate of service. The State reasons that if the petitioner did not mail his *pro se* petition on October 20, 2014, as he avers in his certificate of service, then the trial court was not required to accept the certificate of service as true and was correct in dismissing the petition as untimely.

¶ 21 Illinois courts have held that a certificate of service may be sufficient despite "very slight defects." *Curtis v. Pekin Insurance Co.*, 105 Ill. App. 3d 561, 566 (1982) (citing to *Kimbrough v. Sullivan*, 131 Ill. App. 2d 313 (1971), and explaining that very slight defects in the proof of service that result in nonconformity to Rule 12(b) seldom constitute reversible error). Our supreme court has described such a defect as "a typographical error, misspelling, or other inadvertent mistake." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 217 (2009) (finding that defendant failed to provide proof of service or an affidavit, which is not a slight defect in the form of the notice but rather a failure to prove

that it complied with the jurisdictional 30-day notice requirement in Illinois Supreme Court Rule 303 (eff. Jan. 1, 2006)).

¶ 22 The State contends that the certificate's error is not a slight defect because the certificate of service does not serve its purpose: it cannot establish the date of mailing. However, this argument ignores the fact that the date stamp on the petitioner's postage payment form is clear evidence that he did, in fact, place his *pro se* petition in the prison's mailing system before the October 29, 2014, filing deadline. When the petition, certificate of service, and postage payment form are viewed together, it is clear that the petitioner's date of his certificate of service is a typographical error. With the postage payment form available as evidence supporting the fact that the documents were placed in the prison mailing system in a timely manner, it is also clear that this typographical error is harmless.

¶ 23 Even if we agreed that the certificate of service was invalid for its failure to state a date on or after the notary's date written on the petitioner's *pro se* petition, we note that the proof of service requirements have been relaxed for incarcerated individuals. See Ill. S. Ct. R. 12(b)(4); *People v. Smith*, No. 113396 (Ill. Mar. 26, 2014) (supervisory order) (directing the appellate court, which had found that defendant's unnotarized proof of service was insufficient to prove his postjudgment motion was timely mailed, to vacate its judgment and treat the motion as having been timely filed). Also, the Second District has held that a postmark from the United States Postal Service may provide sufficient proof of mailing in the absence of an affidavit certifying when the documents were mailed. See *People v.*

Hansen, 2011 IL App (2d) 081226, ¶ 14.⁷ While the file stamp on the petitioner's postage payment form is not a United States postmark, our courts have held that due process requires that a prisoner who places a motion in the prison mail system should be placed in the same position as one who places a document in the United States mail. *People v. Easley*, 199 Ill. App. 3d 179, 183 (1990).

¶ 24 Either the petitioner's date on his certificate of service or the notary's date on his *pro se* petition is an error. However, we find that, based on the evidence before us, it was a trivial one. It is relevant that both of the dates (October 20 and 21, respectively), as well as both of the dates on the postage payment form (October 25 and 28), are before the petition's due date of October 29, 2014. There is competent evidence before this court that the petitioner placed his documents in the prison mailing system in a timely manner; nothing refutes the petitioner's contention that the petition was filed before the October 29, 2014, due date.

¶ 25 Moreover, we note that, even if we considered the petition to be untimely, we agree with the petitioner that it was not due to his culpable negligence. Culpable negligence "is something more than ordinary negligence, mere neglect, or the failure to use ordinary care—it is negligence that is censorious, faulty or blameable." (Internal quotation marks omitted.) *People v. Bocclair*, 202 Ill. 2d 89, 107 (2002). When a petitioner prepares his petition in a timely manner, submitting it to the court in advance of the date it must be filed, a delay in the date on which the petition was received may be found to be beyond his culpable negligence.

⁷We note that other courts have held that a postmark is insufficient proof of service. See *People v. Lugo*, 391 Ill. App. 3d 995, 998 (2009) (an earlier panel of the Second District so finds); *People v. Blalock*, 2012 IL App (4th) 110041, ¶ 11.

See *People v. Rissley*, 206 Ill. 2d 403, 421 (2003) (defendant found not culpably negligent in filing his postconviction petition six days after the statutory period expired, as he had filed it before the due date that his attorney had supplied to him). We cannot agree that, where there is evidence that the petitioner placed his documents in the prison mailing system before the October 29, 2014, filing date, any delay in filing was due to his culpable negligence.

¶ 26 Finally, we disagree with the petitioner that we should address the merits of his amended postconviction petition. At the second stage of postconviction proceedings, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation; if no such showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245-46. Here, the trial court did not address the merits of the petitioner's claim, finding only that it was untimely. As we disagree with this determination and are reversing the matter, it must now determine whether the defendant made a substantial showing of a constitutional violation. See *id.* We decline to substitute our judgment for that of the lower court.

¶ 27 For the foregoing reasons, we reverse the trial court's dismissal of the petitioner's postconviction petition and remand for further second-stage proceedings.

¶ 28 Reversed and remanded.