

2011 Ill. App. (1st) 092323

SECOND DIVISION
September 30, 2011

1-09-2323

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

)	Appeal from the
)	Circuit Court of
THE PEOPLE OF THE STATE OF ILLINOIS,)	Cook County
)	
Plaintiff-Appellee,)	
)	No. 97 CR 8844
v.)	
)	
DAVID C. VIDA,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

Held : Defendant's postconviction petition was timely filed because the vacation of his original conviction, coupled with the reinstatement of his original sentence, constituted a new "conviction" for purposes of the Post Conviction Hearing Act.

¶1 This appeal arises from the dismissal of defendant David Vida's *pro se* postconviction petition. Defendant filed his original postconviction petition on October 23, 2003, which was

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dismissed as frivolous and patently without merit. Defendant appealed and this court reversed, finding that defendant had stated the gist of a claim, and ordered appointment of counsel. Newly appointed counsel then filed supplemental petitions, which the State opposed as untimely. The trial court agreed and dismissed the petition and supplemental petitions as untimely during second-stage postconviction proceedings. Defendant now appeals. For the following reasons, we reverse the judgment of the circuit court and remand for second-stage proceedings.

¶2

I. BACKGROUND

¶3

Following a jury trial in 1998, defendant was convicted of first-degree murder. He was sentenced to an extended term of 100 years in prison on May 3, 1999, because the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-5-3.2(b)(2) (West 2002). Defendant appealed his conviction and sentence, arguing that the police lacked probable cause to arrest him, that his trial counsel was ineffective for advising him not to testify at trial and failing to present significant evidence, that the trial court erred in allowing the jury to view statements by defendant's mother, and that defendant's 100-year prison sentence as excessive and an abuse of the trial court's discretion in violation of the United States Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This court affirmed defendant's conviction and sentence on June 22, 2001.

¶4

Defendant filed a petition for leave to appeal to the Supreme Court of Illinois. On February 5, 2003, the supreme court denied the petition for leave to appeal, but in that denial order, directed this court to vacate its June 22, 2001, opinion in light of *People v. Swift*, 202 Ill. 2d 378 (2002). See *People v. Vida*, 202 Ill. 2d 696 (2003).

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¶5 On March 28, 2003, this court vacated its judgment dated June 22, 2001. In an unpublished Rule 23 order, this court vacated the portion of the trial court's judgment that extended defendant's sentence to 100 years, and modified defendant's prison term to 60 years. The State timely filed a petition for rehearing, arguing that the sentence should have remained 100 years in light of *People v. Crespo*, 203 Ill. 2d 335 (2003), which was decided four months after *Swift*.

¶6 On May 9, 2003, this court denied the State's petition for rehearing, but simultaneously entered an opinion. In the opinion, this court vacated its judgment dated June 22, 2001, modified the March 28, 2003 order, and reinstated defendant's 100-year sentence. *People v. Vida*, 339 Ill. App. 3d 115 (2003). Defendant filed a petition for leave to appeal to the Illinois Supreme Court.

¶7 During the pendency of that appeal, on October 23, 2003, defendant filed a *pro se* postconviction petition alleging that his 100-year sentence was unconstitutional, that trial counsel was ineffective for failing to present an alibi witness, that the trial court erred by not instructing the jury on involuntary manslaughter or self-defense, and that the evidence was insufficient to convict him of first-degree murder. In support of his petition, defendant attached his own sworn verification and affidavits from two potential alibi witnesses, his mother and father. The trial court dismissed defendant's postconviction petition at stage one, finding that it was frivolous and patently without merit.

¶8 Defendant appealed the dismissal of his *pro se* postconviction petition, arguing that he stated the gist of a constitutional claim of ineffective assistance of trial counsel based on his counsel's failure to present an alibi defense, and that he stated the gist of a constitutional claim

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that the trial court relied upon improper facts in reaching its determination that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty (730 ILCS 5/5-5-3.2(b)(2) (West 2002)), which was the basis for his extended term sentence. This court, in an order dated June 30, 2005, reversed the trial court's dismissal of the petition, finding that defendant's ineffective assistance of counsel claim set forth the gist of a claim. This court noted that it need not reach defendant's claim regarding sentencing because it found that defendant's ineffective assistance of counsel claim warranted further proceedings under the Postconviction Hearing Act (725 ILCS 5/122 *et seq.* (West 2002)). This court remanded the cause to the trial court with directions to reinstate defendant's petition for further consideration.

¶9 Defendant was appointed counsel, and newly appointed counsel filed a supplemental postconviction petition, alleging ineffective assistance of appellate and sentencing counsel. The State filed a motion to dismiss, alleging that the petition and supplemental petition were untimely because the Act mandates that no postconviction petition shall be filed (1) more than 6 months from the denial of a petition for leave to appeal, or (2) more than 45 days after the defendant files his brief on the appeal of the sentence before the Illinois Supreme Court, or (3) three years from the date of conviction, whichever is sooner. The State alleged that defendant was convicted on May 3, 1999, and thus his postconviction petition had to be filed by May 3, 2002. Defendant conceded that his postconviction petition was not filed until October 23, 2003, and thus he failed to file his petition within the three-year limitation period. However, defense counsel argued that defendant was not culpably negligent for his late filing, which is an exception to the rule, because he did not obtain a final determination of his direct appeal until March 24, 2004, when his latest

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petition for leave to appeal the denial of his direct appeal was denied. Defendant argued that he could not file a postconviction petition alleging ineffective assistance of appellate counsel before his direct appeal was complete.

¶10 The trial court found that defendant did not meet the culpably negligent exception and granted the State's motion to dismiss his postconviction petition and supplemental petition.

Defendant now appeals, arguing that his petition was not untimely, or in the alternative, that the late filing was not due to his culpable negligence.

¶11 II. ANALYSIS

¶12 Defendant contends that the trial court's dismissal of his second-stage postconviction petition as untimely was improper. Specifically, defendant contends that the time limitations in this case were not triggered until May 9, 2003, when his 100-year sentence was reinstated, because until that date defendant had no conviction to challenge. The State responds that defendant failed to argue timeliness in his original postconviction petition, and thus has waived the issue on appeal, or alternatively that defendant was sentenced, and thus convicted for purposes of the Act, on May 3, 1999.

¶13 We first address the State's argument that defendant has forfeited this issue on appeal. The State alleges, and we agree, that issues not raised initially in a postconviction petition are forfeited on appeal. *People v. Logan*, 72 Ill. 2d 358, 370 (1978) (any claim not raised in the original or an amended petition is waived) (citing Ill. Rev. Stat. 1975, ch. 38, par. 122-23). The State argues that not only did defendant fail to argue that his petition was timely in his original postconviction petition, but that he in fact conceded its untimeliness. Specifically, the State

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points to his written response to the State's motion to dismiss, in which defendant stated that although he did not timely file his petition, he was nonetheless not culpably negligent in untimely filing his original *pro se* postconviction petition. Appointed defense counsel, during the dismissal hearing, noted that "in regard to timeliness, we concede that [defendant] didn't file his petition in the three-year limitation period." Accordingly, the State contends that in light of defendant's concession that his petition was untimely, he cannot now argue that it was timely on appeal.

¶14 Defendant responds that defendant's postconviction counsel did indeed argue that defendant's sentence/judgment did not become final until after defendant's 100-year sentence was reinstated, albeit in the context of arguing lack of culpable negligence. Defendant contends that because it was litigated below, regardless of the context, it should not be considered waived on appeal. We agree.

¶15 The general rule is that where a question is not raised in a defendant's initial postconviction petition, but raised for the first time on appeal, that issue is deemed waived. *People v. De La Paz*, 204 Ill. 2d 426, 432 (2003). However, we note that this issue was indeed raised in defendant's postconviction petition as well as in defense counsel's argument in response to the State's motion to dismiss the postconviction petition for timeliness. The trial court was afforded an opportunity to address this issue, and thus the issue has not been waived on appeal.

¶16 We now address the merits of this case, namely, whether the trial court's dismissal of defendant's postconviction petition based on timeliness was proper. The portion of the Act at issue in this case, as it appeared when defendant filed his original postconviction petition, read:

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"No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 Ill. Comp. Stat. Ann. 5/122-1(c) (West 2003).

¶17 Accordingly, the limitations periods applicable to the filing of petitions for postconviction relief are tied to one of the three specific events set forth in section 122-1(c): (1) the six-month limitation applies when a defendant appeals to the appellate court, and is triggered by the denial of a petition for leave to appeal to the Supreme Court of Illinois or the date for filing such a petition; (2) the 45-day period applies to cases appealed directly to the supreme court (such as capital cases) or cases where the petition for leave to appeal is granted; and (3) the three-year period from the date of conviction applies to all other cases. *People v. Ivy*, 313 Ill. App. 3d 1011, 1016 (2000) (citing *People v. Reed*, 302 Ill. App. 3d 1007, 1009 (1999)). We note that this section of the Act, as it appears today, is entirely different and infinitely more readable. Thus, our analysis in this case is strictly based on the version of section 122-1(c) as it appeared when defendant filed his postconviction petition in 2003, and is not applicable to any of the subsequent versions.

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¶18 The case at bar was not a case that was directly appealed to the supreme court, nor was a petition for leave to appeal to the supreme court ever granted, and thus the 45-day limitations period is not applicable. Accordingly, either the three-year limitations period or the six-month limitations period applies, whichever is sooner. *Reed*, 302 Ill. App. 3d at 1008.

¶19 "A defendant who takes no direct appeal from his conviction has three years to file a timely postconviction petition. *** The six-month limitation period applies only after an appeal from the judgment of conviction is taken and the appellate court renders judgment." *People v. Ross*, 352 Ill. App. 3d 617, 619 (2004) (citing *People v. Reed*, 302 Ill. App. 3d 1007 (1999)). Because there was a direct appeal in this case, it would seem that the three-year limitations period would not apply. However, the court in *Reed* stated that the three-year limitations period "may be involved" even in the event of a direct appeal if, for example, the direct appeal and the petition for leave to appeal to the supreme court process were to extend beyond three years from the date of conviction. *Reed*, 302 Ill. App. 3d at 1009.

¶20 Thus, the initial question is when defendant was "convicted" for purposes of the Act. Defendant urges us to find that his conviction became final on May 9, 2003, when his original sentence was reinstated, while the State contends that his conviction was on May 2, 1999, when defendant was originally sentenced.

¶21 The parties are correct that for purposes of the Act, "conviction" means a final judgment that includes both a conviction and a sentence. See *People v. Woods*, 193 Ill. 2d 483, 488 (2000) (the date of conviction means the date that sentence was entered because that date includes the sentence pronounced by the court). The rationale for equating "conviction" in section 122-1 of

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the Act with the date of sentence is consistent with the purposes underlying the Act. *Id.* at 488-89. The Act is intended to provide a remedy for constitutional violations that occur at trial or sentencing, and thus the Act contemplates that a petitioner will raise in one postconviction petition all constitutional issues, whether they relate to trial or sentencing. *Id.* at 489 (citing *People v. Brisbon*, 164 Ill. 2d 236, 242 (1995), and *People v. Flores*, 153 Ill. 2d 264, 273 (1992)). Thus, defendant contends that he was "convicted" for purposes of the Act on May 9, 2003, when his original sentence was reinstated, and until then he had no "conviction" to challenge under the Act. In support of such proposition, defendant relies on *People v. Hager*, 202 Ill. 2d 143 (2002).

¶22 In *Hager*, the defendant was sentenced on December 19, 1991. He appealed his conviction and sentence. On January 18, 1994, the appellate court affirmed the defendant's convictions but remanded the cause to the circuit court for resentencing. *Hager*, 202 Ill. 2d at 145. The defendant did not file a petition for leave to appeal this decision to the supreme court. On April 15, 1995, the circuit court resentenced defendant. The defendant again appealed, arguing that the sentence was excessive. On February 21, 1997, the appellate court affirmed the defendant's sentences. On October 17, 1997, the defendant filed his *pro se* postconviction petition. The circuit court summarily dismissed the petition as frivolous and without merit. *Id.* at 146.

¶23 The appellate court affirmed the dismissal of the postconviction petition, but not on the basis that the petition was without merit. Rather, the court affirmed based on a finding that the defendant's petition was untimely. The court found that the three-year limitations period would

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not have begun to run until defendant's convictions were affirmed on appeal in February 1997, because only then would defendant's convictions have been "final." *Id.* at 147. The appellate court reasoned that the deadline which resulted from applying the six-month limitation – either after the first appeal in 1994, or after the second appeal in 1997 – would be sooner than the deadline that resulted from applying the three-year period from the 1997 affirmance of his convictions on appeal. Accordingly, because section 122-1(c) dictates that the earliest date must be used, the court set the three-year period aside.

¶24 The appellate court then concluded that a postconviction petition could have been filed following the first appeal in 1994. The court recognized that the first appeal resulted in the reversal of the defendant's sentence, but found that the defendant could nevertheless have raised nonsentencing issues while the sentencing issue was being resolved in the trial court. *Id.* at 147-48. Because the defendant would have had until August 8, 1994, to file a petition for leave to appeal the nonsentencing issues to the supreme court, the appellate court determined that the defendant should have filed his postconviction petition within six months after August 8, 1994. Therefore, the 1997 filing of the postconviction petition was considered untimely. *Id.* at 148.

¶25 The defendant appealed and our supreme court reversed. The supreme court noted that the principal question presented in the appeal was "whether the six-month limitations period described in section 122-1(c) of the Act began to run in this case after the defendant's first appeal, in 1994, or after his second appeal, in 1997." *Id.* at 149. The supreme court never addressed the issue of whether the appellate court correctly found that the February 21, 1997, the date that both his conviction and sentence were affirmed on appeal, was the proper date upon

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which the defendant's conviction became final for purposes of the three year limitations period.

Rather, the court focused only on what a conviction meant in the context of the six-month limitations period.

¶26 The supreme court began its analysis by reiterating the rule from *Woods* that a conviction is a term of art that means a final judgment that includes both a conviction and a sentence. *Id.* at 149. The court then noted that on January 18, 1994, when the appellate court vacated defendant's sentences, defendant did not stand "convicted" for purposes of the Post-Conviction Hearing Act because he had no sentence. *Id.* The court stated that even if the defendant had wished to file a postconviction petition after his sentences were vacated, he could not have because he "simply had no conviction to challenge." *Id.* Rather, the supreme court found that the six-month limitations period did not begin to run again until defendant was resentenced and thus "convicted" for purposes of the Act on April 15, 1995. *Id.* at 149-50. Thus, the defendant would have had six months from the due date of his petition for leave to appeal the April 15, 1995 "conviction" to file his postconviction petition. The supreme court did not disturb the appellate court's finding that his conviction was final for purposes of the three year limitations period on February 21, 1997. *Id.* at 147-48.

¶27 In the case at bar, defendant was sentenced to an extended term of 100 years for his first-degree murder conviction on May 3, 1999. On direct appeal, this court affirmed defendant's conviction and sentence on June 22, 2001. Defendant's sentence was not vacated and remanded for resentencing, as it was in *Hager*, thus not leaving him temporarily "unconvicted" for purposes of the Act. Therefore, the three year limitations period would have begun running on May 3,

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1999, when defendant was originally convicted and sentenced, and defendant would have had until May 3, 2002, to file his postconviction. Because his postconviction petition was not filed until October 23, 2003, his petition would have been untimely.

¶28 However, this case is procedurally unique in that after defendant's judgment and sentence were affirmed on appeal, the supreme court ordered the appellate court to vacate its judgment affirming defendant's conviction and sentence. On February 5, 2003, the supreme court, in the same order denying defendant's petition for leave to appeal the to the supreme court, also directed the appellate court to vacate its order dated June 22, 2001, in light of a recent Illinois supreme court case, *People v. Swift*, 202 Ill. 2d 378 (2002). On March 28, 2003, the appellate court vacated its June 22, 2001 opinion and modified defendant's sentence from 100 years to 60 years. The State then filed a petition for rehearing within 21 days, which was denied. However, on the same date as this court's denial of the State's petition for rehearing, the appellate court modified its March 28, 2003 order reinstating defendant's original 100-year sentence. Petitioner then filed his postconviction petition on October 23, 2003. We find, relying on the recent case of *People v. Inman*, 407 Ill. App. 3d 1156 (2011), that this unique set of procedural facts renders defendant's postconviction petition timely.

¶29 In *Inman*, the defendant was originally convicted and sentenced in 1985 for both murder and attempted murder. 407 Ill. 2d at 1156-57. He was sentenced to natural life in prison for the murder and 30 years for the attempted murder, to be served concurrently. *Id.* at 1157. On direct appeal, the court affirmed the convictions and sentences. The defendant subsequently filed a postconviction petition challenging the natural-life sentence on *Apprendi* grounds (*Apprendi v.*

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New Jersey, 530 U.S. 466 (2000)). On June 21, 2001, the trial court entered an order finding that the sentence violated the rule of *Apprendi*. In July of 2006, the trial court vacated the defendant's sentence and resentenced him to 35 years on the murder conviction, to run consecutively to the 30 years for the attempted murder conviction. *Id.* at 1157.

¶30 On January 16, 2008, the defendant filed a *pro se* postconviction petition arguing that appellate counsel was ineffective. The trial court dismissed defendant's postconviction petition as a successive petition in which defendant failed to obtain leave of the court to file. The defendant argued that his postconviction petition was not successive because the July 2006 order imposing a 35-year sentence was a final judgment distinct from the 1985 judgment that imposed the original sentences. The appellate court agreed, relying on *Hager*. The court held:

"[c]onsistent with [*Hager's*] reasoning, we conclude that the order entered in 2006 sentencing the defendant to consecutive terms on remand constituted a separated 'conviction' for purposes of the Post-Conviction Hearing act. The defendant here did not challenge - and could not have challenged - the proceedings that resulted in the 2006 order until the court entered that order because they had yet to occur. This is true even though the defendant could challenge - and did challenge - the proceedings leading to the 1985 judgment prior to the circuit court's vacating that judgment in 2001." *Inman*, 407 Ill. App. 3d at 1162.

¶31 We are aware that in both *Hager* and *Inman*, the case was remanded to the trial court for resentencing after the judgement was vacated, and thus there was a period where defendant stood

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"unconvicted" between the vacation of the sentence and the resentencing. Whereas here, when the appellate court vacated the sentence of the trial court, it did not remand for resentencing but rather contemporaneously imposed a new sentence, which is a proper exercise of appellate court authority. See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 29, 1999) (on appeal the reviewing court may reverse, affirm, or modify the judgment or order from which the appeal is taken). As the court in *Inman* noted, however, the focus, as it was also in *Hager*, is "on the fact that the first order of conviction had been *vacated*." Pursuant to the reasoning in *Hager* and *Inman* then, each time defendant's judgment was vacated and contemporaneously resentenced, he was entitled to an avenue to challenge the proceedings that led to that new judgment. *Inman*, 407 Ill. App. 3d at 1162.

¶32 We therefore conclude, based on *Hager* and *Inman*, that this court's May 2003 order reinstating his original sentence to 100 years was the date of conviction for purposes of the three-year limitations period of the version of the Act in place when defendant filed his postconviction petition. Thus, defendant had three years from May 9, 2003 to file his postconviction petition on that new conviction, or six months from the denial of a petition for leave to appeal, whichever was "sooner." Here, defendant's denial of his petition for leave to appeal to the supreme court did not occur until March 24, 2004. Six months from March 24, 2004 (September 24, 2004), is before May 9, 2006 (three years from his conviction), and thus defendant had to file his postconviction petition by September 24, 2004. Defendant timely filed his postconviction petition on October 23, 2003. Accordingly, we find that the trial court improperly dismissed defendant's postconviction petition as untimely, and we remand for stage-two proceedings on the

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merits.

¶33 Reversed and remanded.