

2011 IL App (1st) 100284-U  
No. 1-10-0284

**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).

FIFTH DIVISION  
August 5, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the  
 ) Circuit Court of  
Plaintiff-Appellee, ) Cook County.  
 )  
v. ) No. 01 CR 14980  
 )  
DENNIS SCOTT, ) Honorable  
 ) Colleen McSweeney Moore,  
Defendant-Appellant. ) Judge Presiding.

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JUSTICE JOSEPH GORDON delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse  
concurred in the judgment.

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**O R D E R**

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*HELD:* Where defendant abandoned his allegations of ineffective assistance of counsel raised in his *pro se* post-conviction petition when he filed a superseding amended petition that did not raise those allegations, the circuit court's failure to address the sixth amendment challenges was not error, and the court's granting of the State's motion to dismiss defendant's petition at second-stage proceedings was affirmed.

¶ 1 Defendant Dennis Scott appeals from an order of the circuit court granting the State's motion to dismiss his amended post-conviction petition without an evidentiary hearing. On appeal, defendant contends that the court erred when it dismissed his petition because it failed to address his allegations of ineffective assistance of counsel raised in his initial *pro se* petition. We affirm.

¶ 2 Following a 2004 jury trial, defendant was convicted of first degree murder, attempted robbery and burglary for killing 85-year-old Viola Gaecke by repeatedly stomping on her head after she walked in on defendant burglarizing her garage. The trial court sentenced defendant to prison terms of 60 years for the murder, and 7 years each for the attempted robbery and burglary. The 7-year terms ran concurrent with each other and consecutive to the murder sentence for an aggregate sentence of 67 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Scott*, No. 1-04-3487 (2006) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Scott*, 224 Ill. 2d 589 (2007).

¶ 3 In January 2007, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) raising allegations of ineffective assistance of counsel. Defendant alleged that his trial counsel rendered ineffective assistance because he failed to argue in his motion to quash arrest that defendant was under arrest when the police entered his home and ordered him outside, and instead, asserted that he was not arrested until sometime later after a show-up had been conducted. Defendant further alleged that counsel failed to argue in his motion to suppress evidence that defendant had not been advised of his *Miranda* rights prior to being asked for consent to search his home. Defendant also alleged that trial counsel failed to argue in his motion to suppress statements that defendant's inculpatory statement was coerced by the police who tricked him into believing he was not under arrest. Defendant argued that, but for trial counsel's incompetence in presenting these motions, it is likely that all three motions would have been granted, and the outcome of his trial would have been different. In addition, defendant alleged that his appellate counsel rendered ineffective assistance when

he failed to argue on direct appeal that trial counsel was ineffective based on the above allegations.

¶ 4 The circuit court appointed the public defender to represent defendant and advanced his *pro se* petition to second-stage proceedings under the Act. Several months later, the public defender was replaced by private counsel retained by defendant. A second private counsel later joined in representing defendant. At several status hearings over the next year, counsel repeatedly advised the court that they were reviewing the record and would be filing an "amended petition." At one of those hearings, counsel requested a final date to "supplement" defendant's *pro se* petition. The State objected to "any supplemental filings," and counsel then apologized and stated that he "misspoke."

¶ 5 On November 14, 2008, counsel filed his certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). That document initially stated "We have prepared a supplemental petition and advanced the foregoing arguments as discussed, without client." Counsel subsequently crossed out the word "supplemental" and handwrote "amended" in its place. The State

made a specific note of this change to insure it was reflected in the record.

¶ 6 On December 5, 2008, counsel filed an "AMENDED POST-CONVICTION PETITION." The prevailing issue raised in defendant's amended petition was that he was denied his right to a fair trial because the prosecution made improper prejudicial comments in its closing and rebuttal arguments. Also contained in the amended petition was a paragraph labeled "COUNSEL WAS INEFFECTIVE." The paragraph consists of three sentences articulating the two-prong test defendant must meet to demonstrate counsel was ineffective, and citing to *Strickland v. Washington*, 466 U.S. 668 (1984). The petition presents no further argument and is devoid of any facts alleging that counsel rendered ineffective assistance. In a separate one-paragraph section, the petition alleges that the issues raised are not barred by the doctrines of *res judicata* and waiver "because ineffective assistance of counsel can only be raised at this stage."

¶ 7 At a subsequent status hearing, the State remarked that it would be limiting its response to the amended post-conviction petition filed by counsel. The court then expressly asked counsel "[y]our amended filing is superseding the defendant's,

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correct?" Counsel replied "[c]orrect." Counsel also agreed with the court's suggestion that they needed to file an updated certificate pursuant to Rule 651(c) stating that they amended defendant's initial *pro se* petition. Counsel later filed that certificate stating that they consulted with defendant, reviewed his initial petition, and prepared an "Amended Post-Conviction Petition" advancing the arguments discussed with defendant. The State moved to dismiss defendant's petition.

¶ 8 At the hearing on its motion to dismiss, the State noted that it was responding to the allegations raised in defendant's "superseding" amended post-conviction petition. The arguments by both parties focused predominantly on defendant's allegation of improper comments by the State during its closing arguments at trial. The State argued that the comments were not improper, were invited by defense counsel's argument, and did not prejudice defendant. Regarding the allegation of ineffective assistance of counsel, the State noted that defendant's amended petition provided no specificity, no facts, no argument and no case law other than asserting that counsel violated *Strickland*. The State argued that the lack of specificity was fatal to the allegation under the Act, and that the claim had to be dismissed.

¶ 9 Post-conviction counsel argued that trial counsel was ineffective because he failed to object to numerous improper comments during the State's closing arguments. They further argued that appellate counsel was ineffective because he failed to raise the issue of the improper remarks on direct appeal. The State responded that such claims were not alleged in the amended petition, which would have allowed the State to properly respond to them. It further argued that counsel could not be found ineffective because there was no merit to the underlying claim that the comments were improper. The circuit court found that, when viewed in context, the State's comments during its closing arguments were not improper or prejudicial. Regarding the ineffective assistance of counsel claim, the court stated that it is easy to make such an allegation in an attempt to meet the standard of presenting the gist of a constitutional claim. The court found, however, that when there are no facts to support the legal conclusion, then it is difficult to refute such a claim. The court granted the State's motion and dismissed defendant's amended post-conviction petition.

¶ 10 On appeal, defendant contends that the circuit court erred when it dismissed his petition because post-conviction

counsel, the State and the court all failed to address his allegations of ineffective assistance of counsel raised in his initial *pro se* petition, which survived summary dismissal. Defendant correctly notes that a post-conviction petition must survive as a whole or be dismissed as a whole, then claims that his whole petition was not advanced to second-stage proceedings. Defendant argues that there is no indication in the record that he waived or forfeited the issues initially raised in his *pro se* petition, and therefore, his petition must be reinstated for additional second-stage proceedings to address those allegations.

¶ 11 The State argues that defendant abandoned the allegations raised in his *pro se* petition when he filed his amended petition, which superseded his initial petition. The State asserts that the ineffective assistance of counsel claims were no longer before the court because they were not included in the amended petition. The State further argues that the record shows that it was understood by the court, counsel and the State that defendant had abandoned his ineffective assistance of counsel claims in favor of challenging the State's closing arguments.

¶ 12 We review the circuit court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2006); *Coleman*, 183 Ill. 2d at 378-79.

¶ 13 Our supreme court has long held that where an amended post-conviction petition filed by counsel does not contain allegations of ineffective assistance of counsel that were raised in defendant's initial *pro se* petition, such allegations are no longer before the circuit court. *People v. Phelps*, 51 Ill. 2d 35, 38 (1972). An amended post-conviction petition supersedes defendant's original *pro se* petition such that any claims not included in the amended petition are not properly before the circuit court. See *People v. Pinkonsly*, 207 Ill. 2d 555, 566-67 (2003), citing *Phelps* and *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn").

¶ 14 In addition, nonspecific and nonfactual assertions that amount to mere conclusions are insufficient to require an evidentiary hearing under the Act. *Coleman*, 183 Ill. 2d at 381. To obtain post-conviction relief, the Act dictates that defendant's petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 722 ILCS 5/122-2 (West 2006). The petition must allege why counsel was ineffective. *People v. Jones*, 341 Ill. App. 3d 103, 107 (2003), *aff'd*, 213 Ill. 2d 498 (2004). A mere allegation that defendant was denied his right to effective assistance of counsel, with no further detail, is insufficient to meet the pleading requirements of the Act. *Id.*

¶ 15 Here, we find that defendant's allegations of ineffective assistance of counsel raised in his *pro se* post-conviction petition were abandoned when counsel filed the amended petition that did not include those allegations. The amended petition superseded defendant's *pro se* petition; therefore, because the allegations in the *pro se* petition were not re-alleged in the amended petition, they were no longer before the circuit court. The record shows that defendant's post-conviction counsel expressly confirmed for the court and the State that the

amended petition was superseding defendant's *pro se* petition, and counsel made no attempt to further pursue the ineffective assistance of counsel claims initially raised by defendant.

¶ 16 Furthermore, the amended petition failed to sufficiently state a constitutional claim of ineffective assistance of counsel. The amended petition merely made a conclusory assertion that counsel was ineffective. The petition was completely devoid of any factual allegations or legal argument to support that assertion. The allegation thereby failed to meet the pleading requirements of the Act.

Accordingly, we find that the circuit court did not err when it did not address the allegations raised in defendant's *pro se* petition, and its dismissal of defendant's amended petition was proper.

¶ 17 For these reasons, we affirm the judgment of the circuit court of Cook County granting the State's motion to dismiss defendant's amended post-conviction petition.

¶ 18 Affirmed.