

Nos. 1-08-0682, 1-08-2619 and 1-08-2622 (Consolidated)

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 93 CR 10870
)	
NATHANIEL BROWN,)	The Honorable
)	Carol A. Kipperman,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
JUSTICES LAVIN and PUCINSKI concurred in the judgment.

ORDER

HELD: The trial court erred in dismissing defendant's *pro se* and supplemental petitions for postconviction relief where he demonstrated a substantial showing of a constitutional violation by attaching affidavits to his petitions identifying individuals who would have provided defendant with an alibi defense.

Petitioner Nathaniel Brown appeals the trial court's dismissal of his *pro se* and supplemental postconviction petitions for relief (collectively referred to hereinafter as "petitions") during the second stage of postconviction proceedings pursuant to the Postconviction Hearing Act (725 ILCS 5/122-1 *et seq.*) (West 2002)). Brown claims that this

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court directed the trial court on remand to conduct an evidentiary hearing regarding his allegations of ineffective assistance of counsel. Brown contends that the trial court exceeded its authority when it dismissed his petitions without conducting the required evidentiary hearing. Brown also contends that the trial court erred in dismissing his petitions on the basis that he failed to make a substantial showing of a violation of his constitution rights because his petitions and supporting affidavits identified individuals who would have provided Brown with an alibi defense. For the reasons that follow, we reverse and remand.

Following a jury trial, Brown was found guilty of two counts of aggravated criminal sexual assault and two counts of criminal sexual assault of K.H., a 12 year old girl. The trial court sentenced Brown to 15 years for each aggravated criminal sexual assault to run consecutively, and to concurrent five year terms on each criminal sexual assault that merged into the 15 year sentences. Brown was found guilty of sexually assaulting K.H. four times between September 1992 and January 1993 while she was staying in the Brown residence. This court affirmed the trial court's judgment on direct appeal. *People v. Brown*, No. 1-93-1784 (1997) (unpublished order pursuant to Supreme Court Rule 23). The Illinois Supreme Court on October 1, 1997, denied Brown's untimely filed petition for leave to appeal.

Brown filed a *pro se* petition on March 30, 1998, raising 17 issues, including a count for ineffective assistance of counsel for failing to call several individuals to testify during the trial. Brown on April 27, 1998, amended his petition to raise three additional allegations. The trial court summarily denied Brown's petition on May 8, 1998, finding the petition frivolous and patently without merit. Brown appealed the trial court's dismissal. This court on May 25, 2001,

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reversed the trial court's dismissal concluding that Brown's contentions of ineffective assistance of counsel raised the gist of a meritorious constitutional claim and remanded the cause for further proceedings consistent with the order. *People v. Brown*, No. 1-98-1960 (2001) (unpublished order pursuant to Supreme Court Rule 23).

On remand, Brown was represented by counsel. The State filed a motion to dismiss Brown's petition on June 14, 2002 because the petition was untimely filed. The trial court on March 26, 2003, dismissed Brown's petition. Brown appealed the dismissal. This court on September 2, 2005, reversed the trial court's dismissal concluding that the petition was timely filed. *People v. Brown*, No. 1-03-1185 (2005) (unpublished order pursuant to Supreme Court Rule 23). This court remanded the cause for new second-stage proceedings.

Brown also filed a *pro se* motion to vacate the mandatory consecutive sentences on June 25, 2003, claiming that the consecutive sentences were improperly imposed because the underlying offenses were not committed as part of a single course of conduct. The trial court treated the motion as a postconviction petition, which it dismissed on July 1, 2003 as frivolous and patently without merit. The trial court ordered that notice of the decision be sent to Brown. On September 17, 2003, Brown filed a notice of appeal. This court treated Brown's notice of appeal as a petition for leave to file a late notice of appeal because the record did not reveal that Brown was notified of the trial court's dismissal. This court granted the petition to file a late notice of appeal and considered the issues raised in the petition. Brown claimed that his concurrent five year sentences for criminal sexual assault were improper because they arose from a single physical act. On September 9, 2005, this court concluded that because Brown

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failed to provide an adequate record on appeal to assess his claim, this court must presume that the trial court properly dismissed Brown's petition. *People v. Brown*, No. 1-03-3198 (2005) (unpublished order pursuant to Supreme Court Rule 23).

On September 29, 2006, Brown filed a *pro se* "Petition for relief of 'Void Judgment' (Instant) Pursuant to Section 2-1401 of the Code of Civil Procedure." 735 ILCS 5/2-1401 (West 2006). Because Brown was represented by counsel, the State on November 17, 2006, moved to strike all *pro se* pleadings he filed during that representation. The trial court struck all of the *pro se* pleadings and denied leave to file the section 2-1401 petition. Brown filed a motion to reconsider, which the trial court denied. Brown appealed. This court on September 18, 2008 reversed concluding that Brown's section 2-1401 petition constituted a new action and the trial court should have allowed Brown to file the petition. *People v. Brown*, No. 1-07-0826 (2008) (unpublished order pursuant to Supreme Court Rule 23). This court remanded with instructions that Brown be granted leave to file his *pro se* section 2-1401 petition. *Id.*

Brown filed on September 17, 2007, a motion to dismiss the court appointed counsel and asked the trial court to grant him permission to proceed *pro se*. The trial court on November 2, 2007, granted Brown's motion. On December 11, 2007, Brown filed another *pro se* amended postconviction petition.

On May 9, 2008, the State filed a motion to dismiss all of Brown's *pro se* and supplemental petitions. Brown filed a motion to strike the State's motion to dismiss with prejudice on July 11, 2008. On August 22, 2008, Brown filed a supplemental motion to strike, which the trial court denied. The trial court also on August 22, 2008, dismissed Brown's

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petitions because he failed to make a substantial showing of a violation of his constitutional rights. Brown timely appealed and he is represented by counsel in this appeal.

STANDARD OF REVIEW

Brown seeks review of the trial court's dismissal of his petitions at the second stage of a postconviction proceeding. We review the trial court's dismissal adopting a *de novo* standard of review. *People v. Jones*, 358 Ill. App. 3d 379, 384 (2005).

ANALYSIS

The Act permits a defendant to challenge a conviction or sentence based on alleged violations of federal or state constitutional rights. *People v. Wheeler*, 392 Ill. App. 3d 303, 307 (2009). A postconviction proceeding is limited to a review of constitutional claims not presented at trial. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). In non-capital cases, the Act provides for review of constitutional claims in three stages. *Wheeler*, 392 Ill. App. 3d at 307. At the first stage, the trial court reviews the petition to determine whether the petition is frivolous and patently without merit. *Id.* at 307. A petition failing to present "the gist of a constitutional claim" is considered frivolous and patently without merit. *Harris*, 224 Ill. 2d at 126. A trial court dismisses petitions that are frivolous and patently without merit, and such dismissals are final orders. *Id.* at 126. At stage two, the trial court may appoint counsel for a defendant and the State may move to dismiss the petition. *Wheeler*, 392 Ill. App. 3d at 307-08; *Harris*, 224 Ill. 2d at 126. At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Harris*, 224 Ill. 2d at 126, citing 725 ILCS 5/122-6 (West 2002). A petition that is not dismissed at the second stage, then proceeds to the third stage

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where the trial court conducts an evidentiary hearing. *Harris*, 224 Ill. 2d at 126, citing 725 ILCS 5/122-6 (West 2002).

On appeal, Brown claims that this court directed the trial court on remand to conduct an evidentiary hearing relating to his claims of ineffective assistance of counsel for failing to call individuals to testify during the trial. Brown contends that the trial court exceeded its jurisdiction by not following this court's mandate when it failed to conduct such a hearing prior to dismissing the petitions. Brown maintains that the law of this case dictates that an evidentiary hearing must be conducted before his petitions may be dismissed.

Although this court's May 25, 2001 order states that Brown is entitled to an evidentiary hearing, the remainder of the order establishes that this court reviewed Brown's first stage petition. Specifically, this court's order stated that "the petition need only present the gist of a meritorious constitutional claim to survive dismissal." This court concluded that Brown met the low threshold of presenting the gist of a meritorious constitutional claim, which is the threshold associated with the first stage of a postconviction proceeding.

In the May 25, 2001 order, this court reviewed the trial court's ruling regarding Brown's first stage and not second stage postconviction proceeding. A defendant is entitled to an evidentiary hearing at the third stage of a postconviction proceeding. *People v. Dodds*, 344 Ill. App. 3d 513, 520 (2003). A trial court conducts an evidentiary hearing "only where the allegations of the postconviction petition make a substantial showing that the defendant's constitutional rights have been violated." *People v. Marshall*, 375 Ill. App. 3d 670, 681 (2007). A trial court "should not collapse the second and third stages of postconviction proceedings."

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Dodds, 344 Ill. App. 3d at 520.

Brown's brief on appeal acknowledges that this court's May 25, 2001 order pertained to a first stage dismissal. Brown claims that the trial court was required to conduct an evidentiary hearing before procedurally proceeding to the third stage of a postconviction proceeding. The Act's provisions, however, fail to support Brown's contention. *See generally* 725 ILCS 5/122-1 *et seq.* (West 2002). This court's May 25, 2001 order read in its entirety establishes that this court was reviewing the dismissal of a first stage proceeding. After reviewing the record, this court in its May 25, 2001 order reversed the trial court's dismissal of the first stage postconviction petition and remanded the cause for further proceedings, which would be a second stage postconviction proceeding. The trial court did not exceed its authority on remand because it conducted postconviction proceedings consistent with review of a second stage petition.

Brown next claims on appeal that the trial court erred in dismissing his petition on the basis that he did not establish a substantial showing of a constitutional violation. Brown contends that the individuals' affidavits attached to his petition provided exonerating evidence supporting his defense that he was out of town during the Martin Luther King weekend when the last sexual abuse act was alleged to have occurred. Brown also claims that the individuals' affidavits would have provided exonerating evidence because the affidavits stated that K.H. slept in a room that she shared with her friend, and not in a separate room by herself. Brown claims that if the individuals had testified, their testimony would have exonerated him and would have bolstered the credibility of his family who testified that K.H. did not sleep in a room by herself.

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Brown contends that he demonstrated in his petitions a substantial showing of ineffective assistance of counsel and that he is entitled to an evidentiary hearing.

Claims of ineffective assistance of trial and appellate counsel are decided applying the test set forth in *Strickland v. Washington*, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005). To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness. *Id.* at 105. A defendant must also establish that he was prejudiced by counsel's deficient performance such that "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Id.* at 106. At the second stage of a postconviction petition, "the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *Id.* at 106. Unlike a postconviction proceeding in the first stage where a gist of a constitutional violation must be demonstrated, a defendant must satisfy a higher threshold in a second stage proceeding by demonstrating a substantial showing of a constitutional violation. Here, Brown met that threshold.

An evidentiary hearing conducted during a postconviction proceeding permits a trial court to "hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claims and where attorney-client privilege no longer applies." *People v. Weeks*, 393 Ill. App. 3d 1004, 1011 (2009). The trial court makes fact-finding and credibility determinations during an evidentiary hearing at the third stage of

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postconviction proceedings. *Marshall*, 375 Ill. App. 3d at 674. Conducting an evidentiary hearing also provides the trial court with the opportunity to gather facts to determine whether defendant received ineffective assistance of counsel and to determine the credibility of witnesses. See *People v. English*, 403 Ill. App. 3d 121, 135 (2010).

Brown in his petition alleged that counsel provided ineffective assistance because alibi witnesses who could have provided exonerating testimony were not called to testify during trial. Attached to Brown's petition were the affidavits of: (1) Columbus Price; (2) Juanita Price (unsigned); (3) Edward Allen; (4) Ann Allen; and (5) Frank Watts. The affidavits of Columbus and Juanita stated that Brown stayed at their house with their family in Ohio throughout the entire Martin Luther King weekend in 1993. The affidavits of Edward and Ann stated that on each and every occasion when they visited the Brown residence during the evening hours between September 1, 1992 and March 1, 1993, K.H. was sleeping in her friend's bedroom. Edward and Ann's affidavits also stated that trial counsel knew this information, but did not call them as witnesses during Brown's criminal trial. Edward and Ann's affidavits further stated that Brown was not home when they visited the Brown residence during the Martin Luther King weekend. Frank's affidavit stated that he received a call from Brown's wife asking for assistance in removing her stalled vehicle since Brown was out of town visiting a friend in Ohio during the Martin Luther King weekend. Frank's affidavit also stated that Brown was not home when he visited the residence over the Martin Luther King weekend and that Brown called him concerning the vehicle in the evening of Monday, January 18, 1993.

Brown's petitions and affidavits present a substantial showing of a constitutional

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violation because based on the record, it is unknown why counsel did not present testimony from individuals who may have provided an alibi defense for Brown during the Martin Luther King weekend or may have raised a question regarding K.H.'s credibility concerning the incidents alleged to have occurred over that weekend and where she routinely slept. In conducting an evidentiary hearing, the trial court would be presented with facts addressing whether trial counsel knew of the individuals and their testimony, and if so, why he made the decision not to present the individuals' testimony. Questions that explore a counsel's trial strategy are best examined after an evidentiary hearing. *Marshall*, 375 Ill. App. 3d at 677, discussing *People v. Gibson*, 244 Ill. App. 3d 700, 704 (1993). After hearing all of the evidence in the instant case, the trial court would then be able make a determination of whether Brown received ineffective assistance of counsel. This court is not rendering a decision regarding the merit of Brown's claims that he received ineffective assistance of counsel, but is limiting its decision to conclude that Brown met his burden of establishing a substantial showing of a constitutional violation.

Accordingly, the judgment of the trial court is reversed and the cause is remanded for proceedings consistent with this order. This court also denies the State's request for a \$100 fee for defending this appeal.

Reversed and remanded.