

No. 1-08-2523

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).

SECOND DIVISION
May 31, 2011

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. 92 CR 11093
)	
ROBERT TENNEY,)	Honorable
)	James B. Linn,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred
in the judgment.

ORDER

HELD: Appeal dismissed where circuit court was without jurisdiction to rule on defendant's *pro se* motion to place his post-conviction petition back on the court's call.

Defendant Robert Tenney, a/k/a Robert Tenny, appeals from the denial of his *pro se* motion requesting the circuit court to place back on its call the petition for relief under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)) he filed in April 1999. In this court, defendant seeks reversal of that ruling, a remand for further proceedings under the Act, and the appointment of counsel who will provide him a reasonable level of assistance.

Following a 1989 jury trial, defendant was convicted of two counts of first degree murder and sentenced to a term of natural life imprisonment for his involvement in a 1978 armed robbery and double murder. On direct appeal, this court reversed his convictions and remanded for a new trial. *People v. Tenny*, 224 Ill. App. 3d 53, 66 (1991). Following retrial in 1996, a jury again found defendant guilty of two counts of first degree murder and he was sentenced to a term of natural life imprisonment. This court affirmed that judgment on direct appeal. *People v. Tenney*, No. 1-96-1641 (1998) (unpublished order under Supreme Court Rule 23).

In March 1999, defendant filed a *pro se* post-conviction petition, alleging, *inter alia*, ineffective assistance of trial counsel and the State's knowing use of perjured testimony. The common law record filed on appeal shows that counsel was appointed for defendant on April 6, 1999. Following that appointment, the case was continued over a two-year period, and on May 8, 2001, defendant filed a *pro se* "supplemental petition" to his 1999 petition in which he solely argued that his sentence

was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant appended to this petition a "motion to appoint counsel other than the public defender," in which he raised several claims relating to a conflict of interest and asserted ineffective assistance of the public defender who was appointed as trial and post-conviction counsel.

On May 23, 2001, the circuit court dismissed defendant's petition, finding that "[defendant] was sentenced to natural life for two murders" and that "[t]his is not an *Apprendi* situation at all under Illinois law." Defendant filed a timely notice of appeal from that ruling and this court affirmed the circuit court's decision, noting that *Apprendi* did not apply retroactively to collateral claims. *People v. Tenney*, No. 1-01-2593, slip op. at 2 (2003) (unpublished order under Supreme Court Rule 23). We also observed that defendant had filed an initial post-conviction petition on April 1, 2001¹, which was not included in the record on appeal. *Tenney*, No. 1-01-2593, slip op. at 2.

In December 2005, defendant filed a *pro se* "motion to put post-conviction back on call," claiming that due to the ineffective assistance of post-conviction counsel, the circuit

¹ There is no indication in the record that defendant filed a petition on this date, rather, it is most likely a reference to defendant's initial post-conviction petition filed on April 1, 1999.

court had never addressed several of the issues he raised in his initial 1999 *pro se* petition. Defendant claimed that counsel had lied to him about the status of his petitions and had never amended his initial petition, causing the court to fail to rule on that petition.

The motion was docketed, then continued over the next two years, until May 15, 2008, when the circuit court heard arguments on it. Defendant appeared, *pro se*, and argued that during his direct appeal, he discovered evidence proving that the State withheld evidence at his trial and that several of the State's witnesses perjured themselves. The circuit court noted that the issues raised in the petition had been raised on direct appeal, and, although this court specifically found discovery violations by the State and false testimony by a witness during defendant's trial, in light of the evidence, they were not enough to grant a new trial.

Defendant then filed a supplemental petition alleging ineffective assistance of post-conviction counsel. On August 18, 2008, the court held a hearing on the matter and the State requested that the case be dismissed from the call. The court reconsidered the petition and determined that "the new filings, as well as the old filings, much of this, maybe all of it, is matters already resolved," and that there were no "infirmities in the conviction or sentence." The court then dismissed the

petition and this appeal followed.

Defendant now contends that he received ineffective assistance of post-conviction counsel, who never filed a certificate pursuant to Rule 651(c) in the original matter, and requests a remand of his cause because the circuit court never ruled on his motion to appoint counsel other than the public defender. The State responds that the circuit court was without jurisdiction to rule on defendant's "motion to put post-conviction back on call" because it had already ruled on the initial petition. We agree.

This court and the circuit courts of this state must enforce and abide by the rules of the supreme court. *People v. Lyles*, 217 Ill. 2d 210, 216 (2005). "The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals, as near as may be." Ill. Sup. Ct. R. 651(d) (eff. Dec. 1, 1984); *People v. Bounds*, 182 Ill. 2d 1, 3 (1998).

Pursuant to Supreme Court Rule 606(b) (eff. Mar. 20, 2009), defendant had 30 days to file either a notice of appeal or a motion directed against the decision entered on his post-conviction petition. *People v. Gutman*, 401 Ill. App. 3d 199, 209 (2010). Defendant, however, did not ask for reconsideration or file a timely post-decision motion but, instead, filed a timely notice of appeal from the dismissal of his post-conviction

petition. *Flowers*, 208 Ill. 2d at 303. When he did so, the jurisdiction of this court attached *instanter*, and the cause was beyond the jurisdiction of the circuit court. *Bounds*, 182 Ill. 2d at 3.

We observe that "[t]he jurisdiction of trial courts to reconsider and modify their judgments is not indefinite," (*People v. Flowers*, 208 Ill. 2d 291, 303 (2003)), and, in this case, it is clear that when defendant petitioned the circuit court to put his post-conviction petition back on the call four-and-a-half years after it had been dismissed, it was without jurisdiction to consider the motion. Thus, its ruling in the absence of subject matter jurisdiction is void. *Flowers*, 208 Ill. 2d at 306, citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 531 (2001). Because the circuit court was without jurisdiction to consider defendant's motion, this court has no authority to consider the merits of defendant's appeal from the order of the circuit court denying it (*Flowers*, 208 Ill. 2d at 307), and, we must dismiss defendant's appeal.

Defendant, nonetheless, argues, without citation to authority (Ill. Sup. Ct. R. 341(h)(7), (j) (eff. July 1, 2008)), that because the circuit court never addressed the merits of the initial 1999 petition, it was not divested of jurisdiction to consider his motion. We disagree.

The record shows that defendant filed his 2001 supplemental petition before the trial court ruled on his initial 1999 post-conviction petition, and in doing so, evinced his intent to add the claims in his supplemental petition to his initial petition. Defendant captioned the 2001 petition as a "supplemental petition," and in his introductory paragraph, moved the court "to admit his 'SUPPLEMENTAL BRIEF AND ARGUMENT' to his 'PETITION FOR POST-CONVICTION RELIEF,' " thereby indicating an addition to the initial petition, and not a separate or successive petition. See *People v. Douglas*, 296 Ill. App. 3d 192, 195-96 (1998) (where an amended petition incorporated the original petition, the reviewing court referred to circuit court's ruling as a dismissal of the defendant's amended petition).

Under these circumstances, there was but one post-conviction petition before the court, and, as determined above, the circuit court lost jurisdiction of this proceeding when defendant filed his notice of appeal from the order of dismissal. The fact that the circuit court did not specifically address the allegations presented in the initial filing does not change the dismissal order or the circuit court's subsequent lack of jurisdiction to consider his motion because a court that lacks jurisdiction cannot confer any relief. *Flowers*, 208 Ill. 2d at 308. Defendant, however, is not entirely without recourse; he is free to file a successive post-conviction petition in accordance with

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the established guidelines. *People v. Jones*, 211 Ill. 2d 140, 150 (2004).

For the foregoing reasons, we vacate the order of the circuit court of Cook County, and dismiss this appeal for lack of jurisdiction.

Appeal dismissed.