

NOTICE

Decision filed 06/24/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0243

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 95-CF-42
	)	
STEVEN D. SUMMERS,	)	Honorable
	)	Dennis E. Middendorff,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Donovan and Spomer concurred in the judgment.

**RULE 23 ORDER**

*Held:* Where the circuit court *sua sponte* dismissed the defendant's postconviction petition at the second stage of postconviction proceedings without notice to the defendant or an evidentiary hearing, the circuit court's dismissal of the postconviction petition is reversed and the cause is remanded to the circuit court for further proceedings.

The defendant, Steven D. Summers, appeals the circuit court's *sua sponte* dismissal of his postconviction petition at the second stage of proceedings. The defendant argues that the circuit court's *sua sponte* dismissal of his postconviction petition, without notice, deprived him of procedural due process. He prays that this court will reverse the dismissal and remand the cause to the circuit court for further proceedings.

The State has filed a confession of error. We find the defendant's contention and the State's concession to be well-taken and grant the requested relief.

**BACKGROUND**

On September 14, 2009, the defendant filed a supplemental postconviction petition that the circuit court dismissed for raising an issue which was previously raised on appeal.

On October 5, 2009, the defendant filed a motion to reconsider, arguing that the postconviction petition should not have been dismissed because it raised issues of ineffective assistance of appellate counsel.

On November 30, 2009, the circuit court granted the defendant's motion to reconsider, reinstated the defendant's postconviction petition, appointed counsel, and granted the defendant leave to amend his postconviction petition. The circuit court also excused the State from filing a response until further notice.

On April 26, 2010, defense counsel filed a Supreme Court Rule 651(c) (eff. Dec. 1, 1984) compliance certificate alleging that, after review, he was of the opinion that all the claims had been raised in previous proceedings and any future claims would be frivolous and without merit.

The circuit court *sua sponte* dismissed the defendant's petition and granted defense counsel's motion to withdraw as counsel. The defendant filed this timely appeal.

#### ANALYSIS

On appeal, the defendant contends that the circuit court erred in *sua sponte* dismissing his postconviction petition without providing him notice or holding an evidentiary hearing. The State has filed a confession of error agreeing that the defendant's contention has merit.

We review *de novo* a circuit court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Post-Conviction Hearing Act (the Act) governs the filing of postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2008). The Act provides a three-stage procedure for governing postconviction petitions. *Id.* In the first stage, the court has 90 days to examine the postconviction petition and enter an order either dismissing the petition as frivolous or patently without merit or docketing the petition for further consideration. 725 ILCS 5/122-

2.1 (West 2008).

If the postconviction petition is not dismissed during the first-stage proceedings, it proceeds to second-stage proceedings, where counsel may be appointed and the State is allowed to file an answer or a motion to dismiss the postconviction petition. "[O]nce counsel has been appointed, any dismissal of the petition should be by adversary process, based on a motion to dismiss filed by the prosecutor, and not done *sua sponte* and summarily by the circuit court." *People v. Volkmar*, 363 Ill. App. 3d 668, 673 (2006). At the third-stage proceedings, the circuit court rules on the relief requested in the postconviction petition after an evidentiary hearing.

In the case at hand, the defendant's postconviction petition had proceeded to the second stage of proceedings and counsel had been appointed. Thus, the circuit court should not have *sua sponte* dismissed the postconviction petition. "If counsel and the trial court believed defendant's case lacked merit, they should have allowed the *pro se* petition to proceed with or without counsel." *People v. Pace*, 386 Ill. App. 3d 1056, 1063 (2008). We conclude that it was not improper for the court to allow the defendant's counsel to withdraw, but we find that the court erred in dismissing the postconviction petition without the State filing a motion to dismiss and the defendant being allowed notice and an opportunity to be heard.

### CONCLUSION

For the foregoing reasons, we reverse the circuit court's dismissal of the defendant's postconviction petition and remand the cause for further proceedings.

Reversed; cause remanded.