NOTICE
Decision filed 03/28/11. 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. 5-09-0365

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 05-CF-590
	)	
DUSTIN CLOVER,	)	Honorable
	)	E. Dan Kimmel,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Chapman and Justice Goldenhersh concurred in the judgment.

RULE 23 ORDER

Held: Where a direct appeal was pending and the circuit court dismissed a postconviction petition more than 90 days after it was filed, the dismissal is reversed and the cause is remanded to the circuit court with directions to docket the petition for further consideration.

The defendant, Dustin Clover, appeals from the circuit court's dismissal of his postconviction petition. The defendant argues that the dismissal order is void because more than 90 days had passed since the postconviction petition was filed. He asks this court to vacate the circuit court's dismissal order and remand the cause with directions to appoint counsel and docket the postconviction petition for second-stage proceedings under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2008)).

The State confesses error and concurs in the prayer for relief. The defendant's contentions and the State's concession are well-taken, and we grant the requested relief.

BACKGROUND

The defendant was convicted of home invasion, aggravated discharge of a firearm,

and aggravated unlawful use of a weapon. After sentencing, the defendant filed a timely appeal. This court affirmed the defendant's convictions on direct appeal. *People v. Clover*, No. 5-07-0351 (March 25, 2009) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)). However, while the direct appeal was still pending, on November 10, 2008, the defendant filed a postconviction petition. The circuit court dismissed the postconviction petition on June 26, 2009. The defendant filed this timely appeal.

ANALYSIS

We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). On appeal, the defendant argues that the circuit court violated the Act by dismissing his postconviction petition more than 90 days after the petition was filed. Furthermore, he argues that the court was not exempt from the 90-day requirement because the defendant's direct appeal was still pending. Therefore, he asks this court to vacate the earlier dismissal and remand the cause to be docketed for further proceedings. In response, the State confesses error regarding the Act's violation and agrees with the requested relief.

The Act, in pertinent part, states as follows:

> "(a) Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this [s]ection.
>
> * * *
>
> (b) If the petition is not dismissed pursuant to this [s]ection, the court shall order the petition to be docketed for further consideration in accordance with [s]ections 122-4 through 122-6." 725 ILCS 5/122-2.1(a), (b) (West 2008).

The 90-day time limit is mandatory and there are no exceptions to the rule. *People v. Smith*, 312 Ill. App. 3d 219, 223 (2000). Furthermore, "[t]here is no provision in the Act barring a postconviction case from proceeding at the same time as a direct appeal." *People v.*

Harris, 224 Ill. 2d 115, 126 (2007). Thus, postconviction petitions and direct appeals may proceed simultaneously. *Id.* at 128. When a postconviction petition is dismissed after the 90-day time limit, the defendant is entitled to have his postconviction petition proceed to second-stage proceedings on remand. *People v. Vasquez*, 307 Ill. App. 3d 670, 673 (1999).

In the instant case, the defendant's postconviction petition was dismissed almost six months after it was filed. This is well beyond the 90-day limit for dismissals provided by the Act. Furthermore, the pending direct appeal does not justify the late dismissal. Therefore, we hold that the circuit court's dismissal was in violation of the Act and that the pending appeal was no excuse for the violation.

CONCLUSION

For the foregoing reasons, we reverse the circuit court's dismissal of the defendant's postconviction petition and remand the cause to the circuit court with directions to docket the postconviction petition for further consideration.

Reversed; remanded with directions.