

No. 1-10-2543

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 9362, 09 CR 5719
)	
JAMES BRECKENRIDGE,)	The Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 HELD: The summary dismissal of *pro se* postconviction petition reversed where the record does not disclose a ruling by the circuit court on the defendant's amended petition, which the clerk's office received seven days before the initial petition was dismissed as frivolous and patently without merit. Cause remanded for second-stage proceedings on amended petition.

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¶ 2 The defendant appeals the trial court's summary dismissal of his *pro se* postconviction petition at the first stage of proceedings. The defendant pled guilty to one count of armed habitual criminal and one count of possession of a controlled substance. On June 4, 2010, while his direct appeal challenging the voluntariness of his plea was pending, he filed a *pro se* postconviction petition. This petition alleged ineffective assistance of counsel. On July 13, 2010, the clerk's office received a second petition from the defendant labeled "Affidavit Petition." The first line of this second petition stated, "I would like to amend my post-conviction." On July 20, 2010, the second petition was filed with the clerk's office. On July 27, 2010, the trial court, without addressing the amended petition or the arguments contained therein, dismissed the defendant's petition as frivolous and patently without merit based only on the ineffectiveness claims raised in the first petition. The record discloses that on August 12, 2010, the court received a letter from the defendant asking to "appeal" the dismissal of his petition and emphasizing the claims in his amended petition. No response to this letter appears in the record.

¶ 3 At the outset, we note the procedural posture of this case. The defendant pled guilty. To appeal a judgment on a plea of guilty, a defendant must first file a timely motion with the trial court asking the court to withdraw the plea and vacate the judgment. *People v. Flowers*, 208 Ill. 2d 291, 301-02 (2003). This the defendant failed to do. For that reason, we dismissed the defendant's direct appeal. *People v. Breckenridge*, No. 1-10-0414 (2011) (unpublished order under Supreme Court Rule 23). However, this requirement does not apply to postconviction proceedings. *Flowers*, 208 Ill. 2d at 302. If a defendant fails to comply with the filing requirements to obtain direct review, his only recourse is to file a postconviction petition. *Id.* at

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301. We now turn to the defendant's claims.

¶ 4 The defendant argues that the trial court improperly refused to consider his amended postconviction petition and, because the court did not consider it within 90 days, remand for second-stage postconviction proceedings is required. The State argues that the defendant was not entitled to have his amended petition considered because (1) it was not properly docketed, (2) he did not file a formal motion to amend his petition, and (3) the amended petition was frivolous or patently without merit.

¶ 5 The Post-Conviction Hearing Act (the Act) provides for postconviction relief when a conviction arises from a substantial violation of a constitutional right. 725 ILCS 5/122-1(a)(1) (West 2008). The postconviction process consists of three stages. *People v. Brown*, 336 Ill. App. 3d 711, 716 (2002). When the trial court fails to address a petition within 90 days of its filing, the petition must be placed on the court's docket for second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2008). The Act provides that only one petition alleging deprivation of constitutional rights may be filed without the court's permission. 725 ILCS 5/122-1(f) (West 2008). However, there is a distinction between an amended petition and a second postconviction petition. See 725 ILCS 5/122-3 (West 2008) (claims "not raised in the original or an amended petition" are waived). Because the burden increases substantially before permission may be granted to file a second petition, the Act provides for liberal amendments to an original petition. 725 ILCS 5/122-5 (West 2008). The circuit court has discretion to allow an "amendment of the petition *** as shall be appropriate, just and reasonable and as is generally provided in civil cases." *Id.* "Generally, when a party asks to amend a complaint, leave to do so is freely given."

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Brown, 336 Ill. App. 3d at 716.

¶ 6 *Brown* addressed a similar issue. In *Brown*, the defendant filed a *pro se* postconviction petition and attached a statement acknowledging that his petition was incomplete but requesting permission to submit an amended filing, which would cure the defects. *Id.* at 713-14. The defendant never filed a formal motion to amend his petition. *Id.* at 717. He did, however, file an amended petition 23 days later. *Id.* at 714. The amended petition was filed before the trial court ruled on the initial petition, which the defendant appeared to concede would be dismissed. *Id.* at 714-15. In its written ruling, "[t]he court addressed each of the petitioner's allegations in the original petition but made no reference or mention of the allegations contained in the amended petition." *Id.* at 715.

¶ 7 Based on the written ruling, the appellate court could not determine whether the circuit court implicitly denied the defendant an opportunity to amend his first petition or, as the State argued, the circuit court "simply refused to address it." *Id.* at 720. In either instance, the *Brown* court decided, the trial court erred. *Id.* at 720-21. The trial court should have considered the defendant's claims raised in the amended petition because amendments are freely granted and the defendant had given notice of his intention to file an amended petition in his first petition before the court ruled on his initial petition. *Id.* The court remanded with instructions to docket the amended petition for second-stage proceedings. *Id.* at 721.

¶ 8 *Brown* controls here. The trial court never addressed the amendments in the second petition and, as such, we cannot determine whether it intended to deny the defendant leave to amend his petition, or simply knew nothing of the second petition. On the record before us, we

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cannot say which applies. As in *Brown*, error occurred regardless, because leave to amend should be freely granted. *Id.* at 720-21. The defendant filed his amended petition a full week before the court issued its ruling. In doing so, he attempted to notify the court that he sought to amend his original petition.

¶ 9 We reject the State's first argument that the amended petition need not have been considered because it was never properly docketed. This was an oversight outside the defendant's control. The defendant could not ensure docketing of his amended petition. See *People v. Johnson*, 232 Ill. App. 3d 882, 884 (1992) (a defendant cannot control his petition beyond placing it in the prison mail system). Neither can we fault the trial court for failing to rule upon an amended petition that, in all likelihood, was completely unknown to the court at the time of its initial decision. A trial court must rely on the clerk system to place matters before it for consideration. If that system breaks down, the trial judge is deprived of an opportunity to timely rule on the allegations in the petition. Nor should the defendant be punished by a breakdown in the system with no consideration of his amended petition.

¶ 10 We are likewise unconvinced by the State's argument that the defendant forfeited review of his amended petition by failing to file a formal motion to amend. The second petition he filed made it perfectly clear that he was seeking leave to file an amendment. Its opening sentence stated, "I would like to amend my post-conviction." Furthermore, there is nothing in the Act or in our case law that makes the filing of a formal motion an absolute requirement for consideration of amended petitions.

¶ 11 With regard to the State's third argument—that the dismissal of the first petition was an

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implicit denial of leave to file an amended petition—we decline to read meaning into the trial court's order when we are presented with nothing to support that this is what occurred. To do so would impute a ruling by the trial judge that he never expressed.

¶ 12 Because we reverse on our *de novo* review of the summary dismissal of the defendant's postconviction petition, we decline to consider the constitutional arguments the defendant presented to us in his briefs. Because more than 90 days have passed since the defendant's amended petition was filed with the clerk's office, we reverse and remand the petition to the trial court for second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 13 Reversed and remanded.