

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).

2012 IL App (4th) 100940-U

Filed 6/18/12

NO. 4-10-0940

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
CARLOS D. MIMS,)	No. 06CF219
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court held the trial court's summary dismissal of defendant's postconviction petition was void and reversed and remanded for further proceedings.
- ¶ 2 In April 2007, a jury convicted defendant, Carlos D. Mims, on six counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i), 407(b)(2), 401(c)(2), 407(b)(1) (West 2006)). At the May 2007 sentencing hearing, the trial court found sentencing defendant on all six counts would violate the one-act, one-crime rule, and sentenced defendant to concurrent terms as follows: 25 years' imprisonment on count VI, a Class X felony, and 10 years' imprisonment on counts II and IV, both Class 1 felonies.
- ¶ 3 On direct appeal, defendant argued (1) the trial court erroneously admitted certain evidence, namely overhear audiotapes, and (2) his sentence was excessive. This court affirmed

the court's judgment in an unpublished order. *People v. Mims*, No. 4-07-0802 (Aug. 19, 2008) (unpublished order pursuant to Rule 23).

¶ 4 On May 20, 2010, defendant filed a *pro se* postconviction petition. The petition alleged ineffective assistance of counsel for (1) trial counsel's failure to impeach a State's key witness, a confidential source, by failing to (a) interview the confidential source's girlfriend, and (b) retrieve documents showing defendant was incarcerated during a certain period; and (2) appellate counsel's failure to raise these issues on direct appeal. Additionally, the petition stated an affidavit from the confidential source's girlfriend was attached (but it is not in the record on appeal).

¶ 5 On June 1, 2010, private counsel entered an appearance on defendant's behalf. Counsel requested additional time to file an amended petition and the trial court granted leave until August 1, 2010. On July 30, 2010, counsel filed a supplement to the postconviction petition. The supplement contained arguments additional to the *pro se* petition, namely that (1) the confidential source's testimony was unfairly prejudicial because it portrayed defendant as a "drug dealer," and (2) the application for an order of interception of a private communication was not supported by probable cause as required by section 108B-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108B-5 (West 2006)). The supplement included an affidavit only from defendant.

¶ 6 The record before us does not show the State filed a response to defendant's postconviction petition. On November 1, 2010, the trial court entered a summary order dismissing defendant's petition. This appeal followed.

¶ 7 In his postconviction appeal, defendant argues that (1) the trial court's summary

dismissal of his petition was void for failure to enter the order within 90 days of his petition's filing, and (2) he stated the gist of a constitutional claim because his trial and appellate counsel were ineffective. The State concedes the untimely summary dismissal order was void and the cause must be remanded for second-stage proceedings. We agree the trial court's summary dismissal is void. As a result, we do not address defendant's second issue.

¶ 8 A first-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Swamynathan*, 236 Ill. 2d 103, 113, 923 N.E.2d 276, 282 (2010).

¶ 9 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a means for a defendant to collaterally attack a prior conviction on the ground the conviction was based on a substantial violation of his or her constitutional rights under the federal or Illinois constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006); *Swamynathan*, 236 Ill. 2d at 113, 923 N.E.2d at 282. The Act provides for a three-stage proceeding in all cases not involving the death penalty. *People v. Harris*, 224 Ill. 2d 115, 125, 862 N.E.2d 960, 967 (2007). In the first stage, the Act directs the trial court to independently assess the substantive merits of the petition, and if the petition is not dismissed at this stage, it advances to the second stage where the court may appoint counsel and the State may move to dismiss the petition. *Harris*, 224 Ill. 2d at 125-26, 862 N.E.2d at 967. If at the second stage a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing. *Id.* at 126, 862 N.E.2d at 967.

¶ 10 Section 122-2.1(a) of the Act sets forth the first-stage procedural requirements, and states, in pertinent part, 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 Section.

(2) If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.

(b) *If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration ***.* (Emphases added.) 725 ILCS 5/122-2.1(a) (West 2010).

Thus, at the first stage, the trial court must independently determine, within 90 days of its filing, whether the petition is frivolous or patently without merit. *Harris*, 224 Ill. 2d at 129, 862 N.E.2d at 969. "The 90-day time requirement is mandatory and a trial court's noncompliance with the time requirement renders a summary dismissal order void." *Swamynathan*, 236 Ill. 2d at 113, 923 N.E.2d at 282. "If the petition is not dismissed within that 90-day period, the circuit court must docket it for further consideration." *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007.

¶ 11 When a defendant files an amended postconviction petition, the 90-day period in which the court must examine the defendant's petition and enter an order thereon is calculated

from the filing of the amended petition. People v. Watson, 187 Ill. 2d 448, 451, 719 N.E.2d 719, 720 (1999).

¶ 12 Here, defendant filed an amendment to his postconviction petition on Friday, July 30, 2010. Ninety days from that date was Thursday, October 28, 2010. The trial court filed its summary order on Monday, November 1, 2010, 94 days after the amended petition's filing date. Therefore, the summary order is void and defendant's postconviction petition must be remanded for stage-two proceedings.

¶ 13 For the foregoing reasons, we reverse the trial court's judgment and remand for further proceedings.

¶ 14 Reversed and remanded with directions.