



¶ 5 In June 2010, the defendant filed a *pro se* motion to vacate the judgment entered on his guilty plea and a motion for appointment of counsel. In his motion to vacate judgment, the defendant maintained, *inter alia*, that his conviction and sentence were void.

¶ 6 In August 2010, the trial court appointed the Madison County public defender to represent the defendant on his motion to vacate judgment and set the matter for a hearing. Notably, Assistant Public Defender Tyler Bateman, who had represented the defendant during the plea proceedings, was again assigned to represent the defendant.

¶ 7 In September 2010, the trial court held an initial hearing on the defendant's motion to vacate the judgment entered on his guilty plea. At the outset, Mr. Bateman informed the court that the defendant had "indicated that he [did] not want [him] to represent him." After confirming that such was the case, the trial court discussed with the defendant his available options regarding representation, and the defendant elected to proceed *pro se*. Stating that the defendant's motion to vacate judgment would later be set for another hearing, the trial court subsequently allowed Bateman to withdraw from the case.

¶ 8 On November 8, 2010, the defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-8 (West 2010)) and an application to proceed as a poor person (see 735 ILCS 5/5-105 (West 2010); Ill. S. Ct. R. 298 (eff. Nov. 1, 2003)). In his postconviction petition, the defendant argued that the three-year sentence that the trial court imposed on his guilty plea was unconstitutional.

¶ 9 On November 16, 2010, the trial court entered an order setting a second hearing on the defendant's motion to vacate judgment for January 2011. On its own motion, the court subsequently reset the hearing for February 2011.

¶ 10 On February 16, 2011, the trial court held a second hearing on the defendant's motion to vacate judgment. After recounting what had occurred at the initial hearing on the motion,

the trial court noted that the defendant had since filed a petition for postconviction relief, which the court stated it had also "reviewed." The court then asked the defendant if he still wished to proceed *pro se*. The possibility that Assistant Public Defender Bateman would again be appointed to represent him was also discussed. The defendant subsequently indicated that although he wanted the assistance of an attorney, he did not want Mr. Bateman's assistance. When the court advised the defendant that there was "a very good chance" that Bateman would again be assigned to his case, the defendant stated, "I'll have to go by myself, I guess."

¶ 11 Thereafter, observing that they generally raised the same issues, the trial court contemporaneously proceeded on the defendant's motion to vacate judgment and his petition for postconviction relief. After hearing the defendant's and the State's arguments regarding the merits of the defendant's pleadings and after specifically addressing each of the defendant's claims of error, the trial court denied both the defendant's motion to vacate judgment and his petition for postconviction relief and entered a written order to that effect. In its written order, the court stated, *inter alia*, that the State had agreed to bypass the first and second stages of the postconviction process and proceed directly to a hearing on the defendant's postconviction petition. At his request, the court filed a notice of appeal on the defendant's behalf and, referencing the defendant's application to proceed as a poor person, appointed the Office of the State Appellate Defender to represent him. The present appeal followed.

¶ 12

#### DISCUSSION

¶ 13 Noting that his petition for postconviction relief was "filed on November 8, 2010, yet not addressed by the trial court until February 16, 2011, 101 days after its filing," the defendant maintains that his cause must be remanded and docketed for second-stage proceedings pursuant to the Act. In response, the State suggests, *inter alia*, that the manner

in which the trial court proceeded on the defendant's petition should be deemed harmless error.

¶ 14 The Act sets forth a procedural mechanism through which a defendant can assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently assesses a defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). If a petition is not dismissed at the second stage, it proceeds to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 245. On appeal, postconviction arguments that "raise purely legal issues" are reviewed *de novo* (*People v. Wrice*, 2012 IL 111860, ¶ 50), as is the construction of the Act itself (*People v. Tidwell*, 236 Ill. 2d 150, 156 (2010)).

¶ 15 In pertinent part, section 122-2.1 of the Act provides 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.

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(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. \*\*\*

(b) If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6." 725 ILCS 5/122-2.1 (West 2010).

¶ 16 Consistent with the legislature's use of the word "shall," our supreme court has held that the procedural rules set forth in section 122-2.1 of the Act are unequivocally mandatory and that a trial court's failure to comply with section 122-2.1 voids any judgment subsequently entered on a defendant's petition for postconviction relief. See *People v. Harris*, 224 Ill. 2d 115, 129 (2007) (noting that the "time limit in section 122-2.1(a) is mandatory" and that the "failure to comply with it requires that the petition be docketed for second stage proceedings"); *People v. Porter*, 122 Ill. 2d 64, 84-85 (1988) (holding that because the time limit in section 122-2.1 is mandatory rather than discretionary, a trial court's "noncompliance \*\*\* renders the dismissal void"); see also *People v. Dauer*, 293 Ill. App. 3d 329, 331-33 (1997) (cited with approval in *Harris*, 224 Ill. 2d at 129-30). Our supreme court has further held that a trial court's failure to comply with section 122-2.1(a) requires that the defendant's postconviction petition be docketed for second-stage proceedings in accordance with sections 122-4 through 122-6 of the Act. *Id.*

¶ 17 Here, 101 days after the defendant filed his petition for postconviction relief, the trial court proceeded and ruled on the petition at the same time that it proceeded and ruled on the defendant's motion to vacate judgment. We note that in the interests of judicial economy, proceeding as the trial court did "was not an unreasonable thing to do." *Dauer*, 293 Ill. App. 3d at 331. "However, we are aware of no case that has permitted a delay in the 90-day rule of section 122-2.1(a) of the Act, however reasonable such an action might be." *Id.* Pursuant to section 122-2.1(b), the defendant's petition for postconviction relief must therefore be docketed for further consideration.

¶ 18 On appeal, the State suggests that because the trial court "*acted*" on the defendant's petition within 90 days by setting it for a hearing, the court's failure to rule on the petition within 90 days should be excused. Under section 122-2.1 of the Act, "a court is required to review a petition within 90 days to determine whether it is frivolous and patently without merit," however, or else "the court *must* docket the petition for further proceedings." (Emphasis in original.) *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011). Thus, even assuming, *arguendo*, that the trial court set the defendant's petition for a hearing within 90 days, because the court failed to either dismiss the petition or docket it for further consideration within that time, the court failed to comply with section 122-2.1, and its order denying the defendant's petition is void. *People v. Swamynathan*, 236 Ill. 2d 103, 114 (2010) (reiterating that the "the failure to summarily dismiss a petition within 90 days requires appointment of counsel and second-stage review" and that "noncompliance renders the dismissal order void").

¶ 19 As previously indicated, the State further suggests that the manner in which the trial court proceeded on the defendant's postconviction petition should be deemed harmless error. The State cites no authority supporting its intimation that a trial court's failure to comply with section 122-2.1 is amenable to a harmless-error analysis, however, and "[a]ccordingly, this contention is waived." *People v. Ceja*, 381 Ill. App. 3d 178, 183 (2008). We also note that in *People v. Guillen*, 261 Ill. App. 3d 1092 (1994), where the proceedings that resulted in the trial court's dismissal of the defendant's postconviction petition "did not technically comply with the Act," the appellate court applied a harmless-error analysis only after emphasizing that "the defendant's petition was dismissed within the 90-day period allotted by section 122-2.1" and recognizing that "our supreme court [has] held that a dismissal outside the time frame provided by section 122-2.1 is void." *Id.* at 1095-97.

¶ 20 Here, because the trial court failed to timely rule as to whether the defendant's petition

for postconviction relief was frivolous or patently without merit, the court's order denying the defendant's petition is void, and the cause must be remanded for further proceedings in accordance with sections 122-4 through 122-6 of the Act. Given our disposition, we need not address the defendant's claims that he did not knowingly and voluntarily waive counsel on his petition for postconviction relief, that the trial court did not set his petition for a hearing within 90 days, and that the hearing that was held on his petition did not comport with the Act or the due process clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2).

¶ 21

#### CONCLUSION

¶ 22 For the foregoing reasons, we hereby vacate the trial court's judgment and remand the defendant's petition for second-stage proceedings in accordance with sections 122-4 through 122-6 of the Act.

¶ 23 Judgment vacated; cause remanded.