

Nos. 1-12-1298 and 12-1299, consolidated

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).

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. 06 CR 10210
)	
ANTHONY LONGSTREET,)	Honorable
)	Timothy J. Joyce,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

Held: Summary dismissal of defendant's amended-postconviction petition reversed where the 90-day period for summary dismissal had expired and the amendment did not trigger a new 90-day period under *People v. Watson*, 187 Ill. 2d 448 (1999).

¶ 1 Defendant, Anthony Longstreet, appeals from an order of the circuit court of Cook County which summarily dismissed his *pro se* amended-postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2012)). The circuit court allowed defendant's initial petition to be amended after that initial petition had been summarily dismissed. Defendant argues his amended-postconviction petition must be remanded for second-stage

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proceedings because the circuit court summarily dismissed the amended-postconviction petition more than 90 days after the filing of the initial petition. We reverse the summary dismissal of defendant's amended-postconviction petition and remand for second-stage proceedings.

¶ 2 In 2008, after a jury trial, defendant was convicted of the aggravated battery of a police officer and sentenced as a Class X offender to eight years' imprisonment.

¶ 3 Defendant *pro se* filed a direct appeal from the judgment and argued, *inter alia*, that his sentence violated the proportionate-penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11. This court affirmed the judgment in *People v. Longstreet*, No. 1-08-1385 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On March 25, 2011, defendant *pro se* filed a postconviction petition which alleged that his conviction and sentence violated the proportionate-penalties clause of the Illinois constitution. Ill. Const. 1970, art. I, § 11.

¶ 5 On June 15, 2011, the circuit court dismissed defendant's postconviction petition as frivolous and patently without merit. Specifically, the circuit court found defendant's proportionate-penalties clause claim had previously been decided on direct appeal and was, thus, barred by principles of *res judicata* and, nonetheless, was meritless.

¶ 6 On July 8, 2011, defendant mailed a *pro se* notice of appeal from the summary dismissal of his postconviction petition, and a motion for leave to file an amended-postconviction petition, with the proposed amended petition to the circuit court clerk's office. Defendant was in custody at that time. The notice of appeal was stamped as filed on July 13, 2011. Appellate counsel was appointed to represent defendant.

¶ 7 The motion for leave to file an amended-postconviction petition, and the proposed amended petition were stamped as received on July 13, 2011, but stamped as filed on August 30, 2011. In his motion, defendant stated he wished to assert a claim that his conviction and sentence violated the *ex post facto* clauses of the United States and Illinois constitutions (U.S. Const., art. I, §10; Ill. Const. 1970, art. I, §16), and that the circuit court erred in dismissing his postconviction petition based on a "misunderstanding" as to his proportionate-penalties argument. In the proposed amended petition, defendant asserted his proportionate penalties and *ex post facto* claims.

¶ 8 Defendant appeared in court, by writ, as to his motion for leave to file an amended petition on October 11, 2011. The circuit court explained to defendant it was without "jurisdiction to permit [him] to amend [his] initial post-conviction petition" due to his filing of the July 13, 2011, notice of appeal. The circuit court stated it did have the jurisdiction and authority to treat his motion for leave to file an amended-postconviction petition as a motion to file a successive postconviction petition. The circuit court admonished defendant that if the motion was recharacterized as a motion for leave to file a successive petition, that he would need to satisfy the cause-and-prejudice standards applicable to a successive petition, and that he would be given an opportunity to withdraw his motion for leave to file an amended-postconviction petition. The circuit court then continued the matter to December 13, 2011, allowing defendant time to decide how he wished to proceed.

¶ 9 On November 18, 2011, this court, after allowing appellate counsel to withdraw, granted defendant's *pro se* motion to dismiss his appeal from the summary dismissal of his postconviction petition.

¶ 10 Defendant, on December 13, 2011, appeared *pro se* before the circuit court and filed a

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"motion to show cause and prejudice to amend *** [his] post-conviction [petition]." The motion informed the circuit court that he had dismissed his appeal. Defendant requested that the circuit court allow him leave to amend his original postconviction petition, and asked that his amended-postconviction petition not be recharacterized as a successive petition. The circuit court took the matter under advisement and set a status date of December 20, 2011.

¶ 11 The circuit court, on December 20, 2011, granted defendant's motion for leave to file an amended-postconviction petition. The court stated the amended petition would "relate back" to the filing of the original postconviction petition, the postconviction proceedings were now "at square one at the first stage and, as of today, within the next 90 days [it] had to determine whether [the case] was frivolous or patently without merit" pursuant to section 122-1 of the Act. 725 ILCS 5/122-1 (West 2010). The circuit court stated it would consider defendant's original and amended-postconviction petitions (together amended-postconviction petition) "in concert," and "as one," and set the matter for February 16, 2012.

¶ 12 On February 16, 2012, the circuit court entered an order summarily dismissing defendant's amended-postconviction petition. The circuit court cited *People v. Henderson*, 2011 IL App (1st) 090923 (where court held that when a defendant has completed his sentence, including the mandatory supervised release (MSR), he loses standing under the Act to pursue his postconviction petition), and found defendant lacked standing because he had been discharged from MSR on November 4, 2011.

¶ 13 On February 17, 2012, defendant *pro se* filed a "motion for declaratory judgment" claiming that the circuit court erred in dismissing his amended-postconviction petition.

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¶ 14 On March 16, 2012, defendant filed a notice of appeal from the February 16, 2012, summary dismissal of his amended-postconviction petition.

¶ 15 On March 30, 2012, the circuit court reviewed defendant's *pro se* "motion for declaratory judgment," finding the motion was in the nature of a motion to reconsider the dismissal of his amended-postconviction petition, and denied the motion.

¶ 16 Subsequently, on April 18, 2012, defendant *pro se* filed a notice of appeal from the denial of his "motion for declaratory judgment." This court granted defendant's motion to consolidate his two appeals.

¶ 17 We first consider defendant's argument that his amended-postconviction petition must be remanded for second-stage proceedings because it was summarily dismissed more than 90 days after the filing of his initial petition. We agree.

¶ 18 The Act offers " 'a remedy whereby defendants may challenge their convictions or sentences for violations of federal or state constitutional law.' " *People v. Chester*, 2014 IL App (4th) 120564, ¶ 15 (quoting *People v. Coleman*, 206 Ill. 2d 261, 277 (2002)). In noncapital cases, there is a three-stage process for the adjudication of a defendant's postconviction petition. *Id.*

¶ 19 At the first stage of proceedings under the Act, the circuit court has 90 days to independently examine the postconviction petition, without input from either side, and summarily dismiss it by written order if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The 90-day period begins to run when the petition is filed and docketed. 725 ILCS 5/122-2.1(a) (West 2012). "The 90-day time requirement is mandatory and a trial court's noncompliance with the time requirement renders a summary dismissal

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order void." *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010). We review the summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

¶ 20 After the summary dismissal of his initial petition, defendant mailed to the clerk of the circuit court a notice of appeal and a motion for leave to file an amended-postconviction petition. The circuit court informed defendant it was without jurisdiction to consider the motion to amend in light of the notice of appeal from the summary dismissal, but it had the jurisdiction and power to treat the motion to amend as a motion for leave to file a successive petition. In response, defendant dismissed his appeal and asked that his motion for leave to file an amended-postconviction petition not be recharacterized as one seeking to file a successive petition. The circuit court granted defendant's request not to recharacterize his motion for leave to file an amended petition, and allowed the amended-postconviction petition to be filed. In granting the motion, the circuit court stated the initial petition and its amendment would then be considered together "as one". Based on all these circumstances, we interpret the circuit court's order granting defendant leave to file an amended-postconviction petition as having effectively vacated the summary dismissal of defendant's initial petition.

¶ 21 Neither side has argued on appeal that the circuit court's granting of the motion to file an amended petition, and its decision to consider the two petitions together as one, was erroneous. Insofar as it is relevant to our analysis, we do not find error in the circuit court's decisions to effectively vacate its earlier dismissal, allow the amendment of the postconviction petition, and consider the amended-postconviction petition together with the original petition.

¶ 22 "[P]ostconviction proceedings are civil in nature." (*Chester*, 2014 IL App (4th) 120564, ¶

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14 (quoting *People v. English*, 2013 IL 112890, ¶ 14)), and the Code of Civil Procedure applies so long as those provisions do not conflict with the Act. *Id.* (citing *People v. English*, 381 Ill. App. 3d 906, 909-10 (2008)). The dismissal of a petition at the first stage, pursuant to section 122-2.1(a)(2) of the Act, is a final judgment. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2006). Thus, after a dismissal at the first stage, a defendant has two choices—file a motion to reconsider that dismissal, or challenge the dismissal on appeal. *Id.* A motion to reconsider the summary dismissal of a postconviction petition must be filed within 30 days of its entry. *Id.*; 735 ILCS 5/2-1301(e) (West 2012). Defendant mailed his motion for leave to file an amended-postconviction petition within 30 days of the summary dismissal. In his motion, defendant argued in part that the summary dismissal was in error and sought to assert an additional claim alleging violation of the *ex post facto* clauses. Under the mailbox rule, the motion for leave to file an amended-postconviction petition was filed within 30 days of the dismissal. See *People v. Saunders*, 261 Ill. App. 3d 700, 703 (1994); *People v. Johnson*, 232 Ill. App. 3d 882, 884 (1992) (incarcerated defendant's postconviction petition is deemed "filed" when placed in prison mail system). See also, generally, *People v. Lugo*, 391 Ill. App. 3d 995, 1003 (2009) (noting "mail box rule" for documents of incarcerated litigants). Thus, the motion was filed in a timely manner such that it allowed reconsideration and vacating of the dismissal order and a determination as to whether the petition should be amended.

¶ 23 "Section 122-5 of the Act (725 ILCS 5/122-5 (West 2012)) provides that the court may allow amendments to postconviction petitions 'as is generally provided in civil cases.'" *People v. White*, 2013 IL App (2d) 120205, ¶ 9. Under this section, a trial court has "discretion to allow amendments at any stage of postconviction proceedings, including the first stage, prior to final judgment." *Id.*;

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People v. Watson, 187 Ill. 2d 448, 454 (1999) (Freeman, C.J., specially concurring.)).

¶ 24 The circuit court reasonably exercised its discretion by allowing defendant leave to file the amended petition and determining that the two petitions would be considered together. The circuit court's actions were appropriate, just, and reasonable in light of defendant's decision to dismiss his appeal of the summary dismissal of his initial petition and pursue his motion for leave to file an amended-postconviction petition.

¶ 25 The point of contention on appeal is whether the amended-postconviction petition should have been advanced to the second stage of postconviction proceedings, and not returned to "square one"—the first stage—because, at the time the motion to amend was granted, the 90-day period from the initial filing had expired.

¶ 26 Such an issue was addressed by our supreme court in *Watson*. In that case, the defendant filed a *pro se* postconviction petition on May 31, 1996. *Watson*, 187 Ill. 2d at 450. In the petition, the defendant requested leave to file an amended-postconviction petition and the circuit court granted that request. *Id.* The defendant then filed an amended petition on August 30, 1996, 88 days after the initial petition had been filed. *Id.* The amended petition was dismissed on September 5, 1996, as frivolous or patently without merit. *Id.* Defendant argued the summary dismissal was improper, as it was entered beyond the 90-day period for first-stage dismissal. *Id.* The supreme court, in considering the issue, found that because a circuit court has authority under the Act to allow an amendment to the petition, "[i]t would be unreasonable to authorize the court to allow amendments to the petition and yet require the court to rule on the petition within the period remaining for consideration of the original petition [two days]." (Emphasis added.) *Id.* at 451.

¶ 27 In this case, the 90-day period for a first-stage dismissal had expired before defendant had sought and was given leave to file an amended-postconviction petition. Furthermore, the circuit court here had summarily dismissed defendant's original petition within the 90-day period and effectively vacated that dismissal by granting defendant's motion to amend his postconviction petition. *Watson* is, therefore, distinguishable from this case.

¶ 28 Under circumstances similar to this case, it has been held that where an amended petition was filed beyond the 90-day time period set forth in section 122-2.1 of the Act, the amended petition must proceed to the second stage. *People v. Volkmar*, 363 Ill. App. 3d 668, 671, 673 (2006) (citing *People v. Greer*, 341 Ill. App. 3d 906, 910 (2003), and *People v. Lara*, 317 Ill. App. 3d 905, 907 (2000)).

¶ 29 The defendant in *Volkmar* filed a *pro se* postconviction petition on April 22, 2002. *Volkmar*, 363 Ill. App. 3d 669. On October 22, 2002, counsel was appointed to represent the defendant. *Id.* On February 7, 2003, the defendant filed a *pro se* motion for leave to amend his postconviction petition. *Id.* at 670. On February 10, 2003, the circuit court dismissed the amended petition as patently without merit and the defendant appealed. *Id.* The appellate court described the issue presented as "whether the filing of an amended petition after the expiration of the original 90-day time period begins a new 90-day time period" during which the circuit court, under section 122-2.1 of the Act, may review the amended petition and summarily dismiss it as frivolous or patently without merit. *Id.* at 671, fn. 1. In deciding the issue, the appellate court examined *Watson* and found "it noteworthy that in *Watson*, the amended petition was actually filed within the initial 90-day time period during which a summary dismissal is allowed." *Id.* at 672. The appellate court did not

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"believe that *Watson* stands for the proposition that any time an amended petition is filed, the 90-day time period for summary dismissal starts anew." (Emphasis in original.) *Id.* The *Volkmar* court noted that the initial petition in that case had proceeded to the second stage and counsel had been appointed before the petition was amended. *Id.* at 669, 672. However, it also held that "once the postconviction proceedings have advanced from the first stage to the second stage by virtue of the expiration of the 90-day period set forth in section 122-2.1 of the Act, the petition may not be summarily dismissed as frivolous or patently without merit." *Id.* at 673. The *Volkmar* court concluded that the 90-day period could be extended under *Watson* only if an amendment to the petition occurred during the initial 90 days. *Id.*; see also *People v. Ceja*, 381 Ill. App. 3d 178, 182 (2008) ("the rule set forth in *Watson*, that the filing of an amended petition causes a new 90-day period to run, applies only while postconviction proceedings are still in the first stage") (citing *People v. Harris*, 224 Ill. 2d 115, 130 (2007)).

¶ 30 In this case, under the Act, by virtue of the expiration of the 90-day period for the summary dismissal of a postconviction petition, the amended petition had advanced to the second stage. The circuit court erred in finding that by granting defendant leave to file the amendment to the petition, a new 90-day period was triggered.

¶ 31 In conclusion, because defendant's amended-postconviction petition was filed beyond the 90-day time period set forth in section 122-2.1 of the Act, the circuit court erred in summarily dismissing the amended-postconviction petition. The dismissal is void for violating the 90-day period and requires remand. See *People v. Porter*, 122 Ill. 2d 64, 85-86 (1988). Therefore, we reverse the dismissal order and remand this cause to the circuit court for further proceedings on the

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amended-postconviction petition. In so ruling, we need not consider the other arguments raised by this appeal.

¶ 32 Reversed and remanded.