

No. 1-12-3140

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 10265
	)	
ERNEST ELLIS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Simon and Justice Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's appeal dismissed for want of jurisdiction.

¶ 2 Ernest Ellis, the defendant, filed a *pro se* petition for relief under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), which the circuit court denied "without prejudice" at the first stage of proceedings. On appeal, defendant contends that his petition should be remanded for second-stage proceedings because the disposition entered by

the circuit court was not authorized under the Act, and therefore void. Defendant also contends that he set forth an arguable claim of ineffective assistance of trial counsel.

¶ 3 Following a bench trial on August 16, 2010, defendant was found guilty of unlawful use of a weapon by a felon (UUWF) and four counts of aggravated UUWF. Based on those crimes, he was also found guilty of being an armed habitual criminal and was subsequently sentenced to a single term of 6½ years in prison for that conviction. This court affirmed that judgment on direct appeal. *People v. Ellis*, 2011 IL App (1st) 102951-U.

¶ 4 On July 27, 2012, defendant filed the form *pro se* postconviction petition at bar, alleging actual innocence and ineffective assistance of counsel. In support of his petition, defendant filed his own affidavit, in which he averred that "[he] was arrested for a gun that wasn't [his]," and he informed police and trial counsel that the real offender was an individual named Devon Allen, a.k.a. "Dutch," who ran into defendant's apartment, closed the door, and jumped out the window. Defendant further averred that Suzette Nichols could corroborate what he told the officers, and that trial counsel tried, but was unable to locate her. Defendant found counsel's explanation "unbelievable," because "[he] told him Ms. Nichols address," but then acknowledged that her address had changed, and that he had been unable to contact her. Defendant also claimed that counsel was ineffective for failing to interview Nichols and call her to testify at trial, and for failing to request a fingerprint analysis.

¶ 5 On August 17, 2012, the trial court timely examined defendant's petition. The court noted that defendant had alleged ineffective assistance of counsel for counsel's failure to produce a witness who could have corroborated his story, but needed an affidavit from her. The court then denied defendant postconviction relief "without prejudice at the first stage[,] \* \* \* [w]ith

instructions to refile same petition if [defendant] is able to get an affidavit from the person that he referred to[.]" The circuit court entered a written order to that effect on August 24, 2012, and the clerk of the court subsequently mailed defendant a certified notice of the disposition, which also informed him of his right to appeal.

¶ 6 On September 4, 2012, defendant wrote a letter to the clerk's office, requesting an extension of time in which to appeal, because "[he had] to get an affidavit from [his] witness" and there were delays in the prison mailroom. He also stated that the letter was his notice of appeal, which the clerk's office treated as timely filed when it was received on September 10, 2012.

¶ 7 In this court, defendant contends that his petition should be remanded for second-stage proceedings because the disposition entered by the circuit court was not authorized under the Act, and therefore void. The State disagrees, and asserts that the dismissal was proper, and that defendant's petition lacked an arguable basis in fact and law.

¶ 8 Although neither defendant, nor the State, has raised the issue of our jurisdiction to entertain this appeal, the supreme court has instructed that a reviewing court must be certain of its jurisdiction prior to proceeding in a cause of action, and if jurisdiction is wanting, we must dismiss the appeal. *R.W. Duntelman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998). The circumstances of this case warrant such an inquiry.

¶ 9 The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings, as here, the circuit court is required to review the petition within 90 days, and if it finds the petition frivolous

or patently without merit, *i.e.*, it has no arguable basis in law or in fact, the Act requires that the court dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10-11. A dismissal entered in this manner is a final judgment. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). On the other hand, if the court finds that the petition has merit, the petition will be advanced to the second stage and counsel will be appointed. 725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10-11.

¶ 10 In this case, the circuit court timely examined defendant's petition within 90 days, but dismissed the petition "without prejudice at the first stage[,] \* \* \* [w]ith instructions to refile same petition" if defendant was able to get an affidavit from Nichols. Although defendant was advised of his right to appeal, and did, in fact, appeal the dismissal of his petition, a trial court's order entered "without prejudice" is not a final and appealable order. *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982). See also *Arnold Schaffner, Inc. v. Goodman*, 73 Ill. App. 3d 729, 731 (1979) (The recitation, "without prejudice" indicates that an order is on its face a non-appealable order).

¶ 11 Therefore, we find that the "without prejudice" order entered by the circuit court was not a final judgment (*Harris*, 224 Ill. 2d at 126), and, as a result, we do not have jurisdiction to consider defendant's appeal. *Dugan*, 91 Ill. 2d at 115. Accordingly, because the circuit court failed to enter a final order as required by the Act (725 ILCS 5/122-2.1(b) (West 2010)), defendant's petition remains pending in the circuit court and proceeds to the second stage. *Harris*, 224 Ill. 2d at 129.

¶ 12 Dismissed because the appellate court lacks jurisdiction.