

**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).

2015 IL App (4th) 130943-U

NO. 4-13-0943

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 14, 2015

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

v. )

SHAWN M. BAHRS, )

Defendant-Appellant. )

) Appeal from

) Circuit Court of

) Champaign County

) No. 11CF204

) Honorable

) Richard P. Klaus,

) Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.

Presiding Justice Pope and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* Summarily dismissing a postconviction petition after the 90-day period in section 122-2.1(a) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a) (West 2012)) is reversible error, regardless of the reason for the dismissal.

¶ 2 Defendant, Shawn M. Bahrs, appeals from the summary dismissal of his petition for postconviction relief. We agree with his opening argument: the summary dismissal was beyond the 90-day period in section 122-2.1(a) (725 ILCS 5/122-2.1(a) (West 2012)) and thus was statutorily unauthorized. Consequently, in our *de novo* review (see *People v. Brown*, 236 Ill. 2d 175, 184 (2010)), we reverse the summary dismissal, and we remand this case for second-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 On July 20, 2011, a jury found defendant guilty of all counts of the information, counts I, II, and III, which charged him, respectively, with aggravated driving under the

influence of alcohol (625 ILCS 5/11-501(d)(2)(D) (West 2010)), driving while his driver's license was revoked (625 ILCS 5/6-303(a) (West 2010)), and aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(4) (West 2010)).

¶ 5 On September 7, 2011, the trial court denied defendant's posttrial motions and sentenced him to 30 years' imprisonment for count I, 3 years' imprisonment for count II, and 3 years' imprisonment for count III, making counts I and II concurrent with each other and count III consecutive to counts I and II.

¶ 6 Defendant filed a direct appeal, and on April 30, 2013, we issued an opinion, in which we agreed with his argument that the trial court had failed to adequately admonish him before allowing him to proceed *pro se* in the sentencing hearing. *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 14. Therefore, we reversed the sentences, and we remanded the case for admonitions in compliance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), to be followed by a new sentencing hearing. *Bahrs*, 2013 IL App (4th) 110903, ¶ 59. On June 6, 2013, the trial court received our mandate.

¶ 7 On June 7, 2013, defendant filed a petition for postconviction relief. A docket entry for that date acknowledges the filing of the petition.

¶ 8 On June 11, 2013, on remand, the trial court admonished defendant pursuant to Rule 401(a). This time, he chose to be represented by counsel in the new sentencing hearing. The court appointed counsel.

¶ 9 On July 24, 2013, in the new sentencing hearing, the trial court imposed the same prison sentences as before: 30 years' imprisonment for count I, 3 years' imprisonment for count II, and 3 years' imprisonment for count III, making counts I and II concurrent with each other and count III consecutive to counts I and II.

¶ 10 On August 8, 2013, the trial court denied defendant's motion to reduce the sentences.

¶ 11 On September 18, 2013, defendant filed a *pro se* motion for a default judgment. The motion claimed that because the court had failed to "answer" the postconviction petition within 90 days, defendant was entitled to a default judgment for the relief he requested in the petition.

¶ 12 On September 26, 2013, the trial court entered an order entitled "Order Dismissing Petition for Post Conviction Relief." Citing *People v. Larimer*, 409 Ill. App. 3d 827 (2011), the order "dismissed" the postconviction petition as "premature." But see *People v. Martin-Trigona*, 111 Ill. 2d 295, 301 (1986) ("The State reads the [Post-Conviction Hearing] Act to allow relief only to convicted persons who are both imprisoned and serving a sentence when the petition is filed, but such a reading would mean that convicted persons actually confined within a penal institution could not petition for relief under the Act while awaiting sentencing or resentencing following an appeal even though this case demonstrates that three quarters of a year might elapse in the interim. We can find no principled reason for adopting that requirement.").

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 The trial court's substantive reason for dismissing the postconviction petition was that after we reversed the sentences on direct appeal, and while defendant was awaiting resentencing, there was no "conviction." To be entitled to postconviction relief, defendant had to have a "conviction" (725 ILCS 5/122-1 (West 2012)), defined as "a final judgment that include[d] both a conviction and a sentence" (*Larimer*, 409 Ill. App. 3d at 828).

¶ 16 This substantive reason, however, is beside the point because the problem in this case is procedural. Within 90 days after a petition for postconviction relief is "fil[ed] and docket[ed]," the trial court must either summarily dismiss the petition or advance it to the second stage—period. 725 ILCS 5/122-2.1(a)(2), (b) (West 2012). In this case, the postconviction petition was "fil[ed]" on June 7, 2013. It was "docket[ed]"—that is, "entered in [the] official record"—the same day. *People v. Brooks*, 221 Ill. 2d 381, 391 (2006). Ninety days after June 7, 2013, was September 5, 2013. The trial court summarily dismissed the petition on September 26, 2013. That was a reversible error. After September 5, 2013, the petition had only one permissible destination—the second stage of the postconviction proceeding—and a summary dismissal was unauthorized and invalid. See *People v. Porter*, 122 Ill. 2d 64, 85 (1988); *Gibson v. People*, 377 Ill. App. 3d 748 (2007).

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, we reverse the summary dismissal of the postconviction petition, and we remand this case for "further consideration in accordance with sections 122-4 through 122-6 [of the Post-Conviction Hearing Act (725 ILCS 5/122-4 to 122-6 (West 2012))]." 725 ILCS 5/122-2.1(b) (West 2012).

¶ 19 Reversed and remanded with directions.