

No. 1-14-0495

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. 05 CR 28068
)	
DOUGLAS LEMON,)	Honorable
)	Neera L. Walsh,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition is reversed and remanded for second-stage proceedings because this court's *de novo* review of the petition does not extend to materials that were not before the circuit court.

¶ 2 Defendant Douglas Lemon appeals the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)).

Defendant contends that his case must be remanded for second-stage post-conviction proceedings because the circuit court failed to examine affidavits of a potential defense witness

that he submitted in support of his petition, and thus did not fully consider his post-conviction claims within the 90-day review period.

¶ 3 Following a bench trial in 2010, defendant was convicted of five counts of aggravated criminal sexual assault and aggravated kidnapping in connection with an incident on November 14, 2005, then sentenced to an aggregate term of 40 years in prison. This court affirmed that judgment on direct appeal, rejecting defendant's contention that the evidence was insufficient to prove his guilt beyond a reasonable doubt. *People v. Lemon*, 2012 IL App (1st) 102932-U.

¶ 4 On August 29, 2013, defendant filed the *pro se* petition at bar claiming, *inter alia*, that trial counsel was ineffective for failing to call Decorian Jackson, Johnny E. Lemon Jr., and Arzestery Davis as defense witnesses. Defendant asserted that Johnny Lemon, his brother, would attest that he saw D.J., the 16-year-old victim, sitting in defendant's car on the night in question "under no duress" and that he could contradict D.J.'s claim that defendant sexually assaulted her at defendant's house after they were among a group of people drinking and socializing earlier in the night. Defendant also filed a "Motion for Abeyance" stating that affidavits in support of his claims were being mailed to him in prison and that he would submit those affidavits to support his petition when he received them.

¶ 5 On October 31, 2013, defendant filed his own affidavit in support of his petition and also attached to the petition affidavits of Davis and Johnny Lemon. In his own affidavit, dated October 17, 2013, defendant detailed the events of the night in question and described his encounter with the victim as consensual. The affidavit of Davis, which was dated February 14, 2007, offered a similar account.

¶ 6 The record on appeal includes three affidavits signed by Johnny Lemon. Each of those documents is notarized and dated June 28, 2009. In the first affidavit, which is handwritten, he averred that he told defense counsel that he saw what occurred between defendant and D.J. on the night in question and that defendant was innocent. He averred counsel assured him he would be able to present that account at defendant's trial and that he was ready to testify at trial and waited in another courtroom but counsel did not present him as a witness.

¶ 7 The second handwritten affidavit contains some of the same attestations included in the first affidavit. In the second affidavit, Johnny Lemon averred that he was present at defendant's trial and wanted to testify but was rebuffed by defense counsel. He averred he was "more than ready to testify" but counsel and defendant were "constantly arguing." He attested counsel was allowed to withdraw from defendant's case but was later reappointed and that defendant told him counsel was biased against him and the male witnesses "due to the nature of the charge." Lemon concluded: "This is why [counsel] always treated me with a very negative attitude and didn't allow me to fully explain what happen[ed]" and "didn't allow me to testify at the trial to state [defendant was] innocent."

¶ 8 In the third affidavit, which is typewritten and four pages long, Johnny Lemon averred that he was with defendant and D.J. on the night in question and that their sexual acts were consensual. He described the events of that evening in detail and asserted that the charges against defendant were fabricated.

¶ 9 On November 19, 2013, the circuit court summarily dismissed defendant's petition in a 27-page written order, finding that the issues raised by defendant were frivolous and patently without merit. The court noted that several of defendant's claims could have been raised in his

direct appeal and therefore were waived. As to defendant's claim that trial counsel was ineffective for failing to call Johnny Lemon, Jackson and others as witnesses, the court stated it had not received affidavits from those individuals despite defendant's promise to provide them. The court further found that the affidavit of Davis did not support defendant's claim because it only stated her observations of the victim prior to the alleged sexual assault.

¶ 10 On appeal, defendant contends that his petition must be remanded for further proceedings under the Act because the circuit court did not "consider and rule on the merits" of his amended petition within the 90-day review period. He asserts that the circuit court was admittedly unaware of his submission of affidavits to support his petition, including the affidavits of Johnny Lemon. Defendant contends the circuit court thus only conducted an examination of the issues raised in the petition and the affidavit of Davis, and he seeks reversal and remandment of his petition for second-stage proceedings.

¶ 11 The Act provides a method by which a defendant may challenge his conviction or sentence based on a substantial denial 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 review, the circuit court must examine the petition within 90 days of its filing and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a), (a)(2) (West 2012). At this initial stage, the defendant need only plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 12 If the court does not dismiss the petition as frivolous or patently without merit within 90 days of its filing, the petition advances to the second stage, where counsel may be appointed for defendant and the State is allowed to respond to the petition, and where the circuit court

considers the petition's legal sufficiency. 725 ILCS 5/122-4, 122-5 (West 2012); *People v. Domagala*, 2013 IL 113688, ¶ 35. A circuit court's order summarily dismissing a post-conviction petition is reviewed *de novo*. *People v. Cathey*, 2012 IL 111746, ¶ 17.

¶ 13 Section 122-2 of the Act includes a requirement that "affidavits, records, or other evidence" accompany a petition to establish that the petition's allegations are capable of objective or independent corroboration. 725 ILCS 5/122-2 (West 2012); *Hodges*, 234 Ill. 2d at 10; *People v. Delton*, 227 Ill. 2d 247, 254 (2008). The affidavits accompanying a post-conviction petition "must identify with reasonable certainty the sources, character and availability of alleged evidence" to support the petitioner's allegations. *People v. Johnson*, 154 Ill. 2d 227, 240 (1993); *Delton*, 227 Ill. 2d at 254. If a post-conviction petition alleges that a defendant's trial counsel was ineffective for failing to call certain witnesses, the defendant must attach to his petition affidavits from those witnesses showing their potential testimony and explaining the significance of their testimony. *Johnson*, 154 Ill. 2d at 240-41; *People v. Barcik*, 365 Ill. App. 3d 183, 190-91 (2006).

¶ 14 In seeking second-stage proceedings under the Act, defendant repeatedly refers to *People v. Watson*, 187 Ill. 2d 448, 451 (1999), where the Illinois Supreme Court held that the 90-day period for the circuit court's consideration of a petition restarts upon the filing of an amended petition. We do not find *Watson* and its discussion of amended petitions to be dispositive in this case, where defendant did not file an amended petition. Defendant filed a petition on August 29, 2013, and, two months later, supplemented his petition with the affidavits, indicated in his "Motion for Abeyance" filed with his petition.

¶ 15 Defendant also relies on numerous cases in which the circuit court ruled on post-conviction petitions beyond the 90-day period. See, e.g., *People v. Vasquez*, 307 Ill. App. 3d 670,

672 (1999) (trial court's summary dismissal order, which was entered after the case was remanded for trial court's failure to substantively review defendant's post-conviction claims, was void because it occurred more than 90 days after the petition was docketed). Here, the circuit court ruled on defendant's petition on November 19, 2013, which was within 90 days of its filing, as required; however, the circuit court did not review the affidavits at issue.

¶ 16 We thus consider our ability to conduct *de novo* review in this case, which is the standard for review of summary dismissals under the Act. See *Cathey*, 2012 IL 111746, ¶ 17. For reasons that are not addressed by the parties or apparent from the record, the affidavits of Johnny Lemon did not make their way to the circuit court judge when she ruled on defendant's petition. The circuit court expressly noticed the absence of any attestations from Johnny Lemon and dismissed the petition, in part, because defendant did not attach any affidavit from that potential witness to support his contention that his trial counsel was ineffective in failing to present him as a witness.

¶ 17 The State acknowledges the apparent failure of the circuit court to review Johnny Lemon's attestations but contends that this court may conduct *de novo* review of the petition and supporting materials to determine whether an arguably meritorious post-conviction claim exists. The State relies on the well-established proposition that this court reviews the circuit court's judgment and not the reasons for that judgment, citing *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010). However, given that the materials now relied upon on appeal were not considered by the circuit court in imposing judgment, we decline to consider these materials for the first time on appeal. In light of the particular facts of this case, we believe the more prudent course is to remand defendant's petition for further proceedings where the affidavits will be before the circuit court.

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¶ 18 Accordingly, we reverse the summary dismissal of defendant's post-conviction petition and remand this case to the circuit court for further proceedings on the petition pursuant to the Act.

¶ 19 Reversed and remanded.