

Nos. 1-16-0332 & 1-16-0702 (Cons.)

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 10 CR 8011
)	
SAMUEL LEWIS,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 Defendant, Samuel Lewis, appeals from the circuit court's summary dismissal of his *pro se* postconviction petition and argues that his petition should be advanced to second stage proceedings because the court summarily dismissed his *pro se* petition without ruling on his pending motion for leave to amend the petition and because the court exacerbated the error by failing to treat a subsequent *pro se* motion as a motion to reconsider. For the following reasons, we vacate the court's summary dismissal of his *pro se* postconviction petition and remand for

second stage proceedings.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, defendant Samuel Lewis was convicted of armed robbery (720 ILCS 5/18-2) (West 2010)) and unlawful vehicular invasion (720 ILCS 5/12-11.1) (West 2010)), after the evidence at trial showed that with the help of an armed accomplice, defendant pulled Pamela Kendall-Rijos out of her vehicle, threw her to the ground, and stole her mink coat, diamond rings and earrings, watch, purse and cell phone. The retail value of those items was over \$100,000. He was sentenced to concurrent terms of 35 years' and 9 years' imprisonment.

¶ 5 Defendant appealed and argued that the trial court erred in denying his motion to suppress identification because his sixth amendment right to counsel had attached when he was arrested in Nevada on a Cook County arrest warrant and brought before a Nevada court for extradition proceedings. Defendant also argued that he received ineffective assistance of trial counsel when trial counsel: (1) failed to object to evidence of other crimes; (2) introduced a photograph of defendant from an unrelated arrest; (3) failed to object to the State's emphasis on defendant's refusal to participate in a lineup; and (4) made an analogy in closing argument that compared reasonable doubt to a football game. We affirmed defendant's conviction and sentences. *People v. Lewis*, 2015 IL App (1st) 130171.

¶ 6 With respect to case 1-16-0332, on September 10, 2015, defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective, without providing any specific information regarding counsel's alleged ineffectiveness. The petition was file stamped October 13, 2015. On November 13, 2015, defendant mailed a *pro se* "Motion to Amend the Post-Conviction Relief Pursuant To 725 ILCS 5/122-1." In this motion, defendant alleged that: (1) he

would have taken the State's plea offer of 21 years if he would have known he could have been sentenced to 45 years; (2) trial counsel failed to request jury instructions for the lesser-included offense of robbery; and (3) trial and appellate counsel failed to challenge the indictment and warrant. The motion was file stamped November 23, 2015.

¶ 7 On December 7, 2015, the court summarily dismissed defendant's *pro se* petition finding that it was frivolous and patently without merit, without considering defendant's motion to amend his postconviction petition. The court found that defendant's allegations were "merely bald, conclusory allegation[s]" because defendant failed to "present in any form how his trial counsel was ineffective" and failed to "show any evidence of ineffective assistance of counsel." The court also found that any claim of ineffective assistance was barred by *res judicata*. On December 22, 2015, defendant mailed a notice of appeal regarding the court's December 7, 2015, ruling.

¶ 8 With respect to 1-16-0702, on January 7, 2016, defendant mailed a *pro se* "Motion to Stay and Reinstate Defendant's Dismissed Post-Conviction Relief." The motion was file stamped on January 13, 2016. In the motion, defendant alleged that his due process rights were violated when the court summarily dismissed his postconviction petition while his amended postconviction petition was pending before the court.

¶ 9 On January 21, 2016, the court addressed defendant's motion to stay and reinstate his postconviction petition, noting that the court had summarily dismissed defendant's *pro se* petition without consideration of his November 13, 2015, motion to amend the postconviction petition. The court further noted that defendant had filed a motion to amend this postconviction petition but it "was not received by the court" and therefore the court did not grant defendant

leave to amend his *pro se* petition. The court dismissed the motion because the December 7, 2015, dismissal of the postconviction petition was a final judgment and the court could not address the issues presented in the “Motion to Stay and Reinstate Defendant’s Dismissed Post-Conviction Relief.” The court stated that “once the petition was dismissed at the first stage, you could only file a motion to reconsider. You would challenge the dismissal on appeal or file a motion to file a successive postconviction petition with these contentions.” Defendant appealed the court’s January 21, 2016, order. On November 9, 2016, this court granted defendant’s motion to consolidate appellate case numbers 1-16-0332 and 1-16-0702.

¶ 10

ANALYSIS

¶ 11 Defendant argues that the court erred in summarily dismissing his *pro se* petition without ruling on his pending motion for leave to amend the initial petition. Therefore, defendant requests that this court remand this matter for a second stage hearing.

¶ 12 The Illinois Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a mechanism by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under either the United States or Illinois Constitution. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998), (citing 725 ILCS 5/122-1 (West 2016)). The purpose of a postconviction proceeding is to allow an inquiry into alleged issues of constitutional magnitude relating to the original conviction and sentence that were not, and could not have been adjudicated on direct appeal. *People v. Harris*, 206 Ill. 2d 1 (2002). Under the Act, a postconviction proceeding not involving the death penalty consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001).

¶ 13 At the first stage, the circuit court must determine whether the petition before it alleges

the "'gist of a constitutional claim.'" *Id.* (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). The gist of a constitutional claim is a low threshold. *Gaultney*, 174 Ill. 2d 418. To reach it, defendant need not set forth the claim in its entirety and is only required to present a limited amount of detail. *Edwards*, 197 Ill. 2d at 244. The detail must be sufficient to establish that a petition's allegations are capable of "objective or independent corroboration." *People v. Hall*, 217 Ill. 2d 324, 333 (2005), (citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002)). A court must rule on a defendant's postconviction petition within 90 days or order it docketed for second stage proceedings. 725 ILCS 5/122-201(a), (b) (West 2014)).

¶ 14 Moreover, at the first stage as well as the second, the allegations in the petition must be liberally construed and taken as true. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2016); *Coleman*, 183 Ill. 2d at 385. If the court determines that a petitioner has stated the "gist of a constitutional claim", the petition is advanced to the second stage and counsel is appointed, if necessary, in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2016).

¶ 15 In this case, the postconviction petition that was before the court alleged only that trial counsel was ineffective. There were no specific instances of conduct or details provided that allowed the court a glimpse of how trial counsel's representation was allegedly ineffective. The court reviewed defendant's postconviction petition and summarily dismissed it within the 90-day period, finding defendant's claim of ineffective assistance of counsel to be "frivolous and patently without merit" and barred by the doctrine of *res judicata*. The court's December 7,

2015, written order did not mention defendant's motion to amend, although it had been filed on November 11, 2015, the petition or any of the additional claims because, at the time of the dismissal, the motion to amend had not yet been placed on the court's call.

¶ 16 The court was not required to wait until the 90th day to dismiss defendant's petition on the off chance that defendant would file anything additional in conjunction with his postconviction petition or seek leave to amend the petition. "The Act merely requires the trial court to make its first-stage order "[w]ithin 90 days after * * * filing and docketing." 725 ILCS 5/122-2.1(a) (West 2002). The Act does not require the court to wait the full 90 days." *People v. Harris*, 224 Ill. 2d 115, 141 (West 2007). This is true especially because the defendant is charged with attaching the necessary affidavits, records, or other evidence to his initial petition to support his claims or explain their absence. *Collins*, 202 Ill. 2d at 66. Nothing in the defendant's initial petition would have given the court reason to believe that anything additional would be forthcoming.

¶ 17 However, given that defendant's motion to amend the petition was filed before the court issued its ruling on defendant's petition, we find that defendant's petition should be advanced to the second stage. Counsel should be appointed and defendant should have the opportunity to properly amend his petition. Our conclusion comes after a thorough review of the contents of defendant's motion to amend his postconviction petition. Had defendant only raised the issue of trial counsel's ineffectiveness in his motion to amend his postconviction petition, we would have affirmed the court's summary dismissal of the postconviction petition because the issue of ineffective assistance of counsel was raised and decided on direct appeal and any further consideration of this issue would be barred by *res judicata*. However, defendant raised the gist

of a constitutional claim in his motion to amend his *pro se* petition with his claim that appellate counsel was ineffective, which could not have been raised on direct appeal. We find that for the sake of judicial efficiency, as well as fairness to defendant, his petition should be advanced to the second stage. *People v. Brown*, 336 Ill. App. 3d 711(2002). As such, we vacate the \$105 fee imposed for filing a frivolous petition.

¶ 18

CONCLUSION

¶ 19 For the foregoing reasons, we vacate the circuit court's summary dismissal of defendant's postconviction petition and vacate the \$105 fee imposed for filing a frivolous petition and remand for second stage proceedings.

¶ 20 Vacated; remanded for further proceedings.