

2019 IL App (1st) 160101-U

No. 1-16-0101

Order filed February 14, 2019

Fourth Division

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 10863
	)	
NORMAN WALLACE,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE GORDON delivered the judgment of the court.  
Presiding Justice McBride and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's order denying defendant leave to file a successive postconviction petition is reversed and the matter remanded for second-stage proceedings where the record shows that the court failed to rule on defendant's initial postconviction petition within 90 days. We vacate the court's assessment of \$105 in filing fees and court costs.

¶ 2 Defendant Norman Wallace appeals from the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS

5/122-1 *et seq.* (West 2014)). He contends that this court should reverse and remand for second-stage proceedings because the record shows the trial court never ruled on his initial postconviction petition. We reverse and remand for second-stage proceedings.

¶ 3 Defendant and codefendant Lettories Causey<sup>1</sup> were charged by indictment with three counts of first degree murder (720 ILCS 5/9-1 (West 1996)) and two counts of armed robbery (720 ILCS 5/18-2 (West 1996)) of the victim Ricardo Epps.

¶ 4 Following a 2001 jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1 (West 1996)) and armed robbery (720 ILCS 5/18-2 (West 1996)), and sentenced to concurrent, respective terms of 52 and 20 years' imprisonment. On direct appeal, this court affirmed defendant's convictions and remanded the matter for resentencing, instructing the trial court to impose consecutive sentences. See *People v. Causey*, 341 Ill. App. 3d 759 (2003). On remand, defendant was sentenced to 46 years' imprisonment for first degree murder and a consecutive term of 6 years' imprisonment for armed robbery. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue on appeal. See *Causey*, 341 Ill. App. 3d 759.

¶ 5 The record shows that on October 19, 1997, the body of Ricardo Epps was discovered in a lot on the block of 800 North Sedgwick. There was a bloodstained 55-gallon steel garbage can nearby and blood spatters on the grass as well as garbage strewn about the area. An autopsy revealed Epps died of blunt force trauma to the head.

¶ 6 Defendant was arrested on April 25, 1999, and confessed to his involvement in the murder of Epps. Defendant stated that he and Causey acted as lookouts while a third individual

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<sup>1</sup> Codefendant Causey is not a party to this appeal.

robbed and beat Epps using a 55--gallon steel garbage can. During the course of the robbery, defendant kicked Epps in the stomach three or four times.

¶ 7 Defendant was convicted of the first degree murder and armed robbery. On February 23, 2004, following remand, defendant was sentenced to 46 years' imprisonment for first degree murder and a consecutive term of 6 years' imprisonment for armed robbery.

¶ 8 On March 18, 2004, defendant mailed a *pro se* motion to reconsider his sentence that was file stamped received by the clerk of the circuit court on March 24, 2004.

¶ 9 On April 5, 2004, defendant mailed a *pro se* postconviction petition under the Act. The petition was file stamped received by the clerk of the circuit court on April 8, 2004. In the petition, defendant alleged: (1) that he was denied due process in his motion to suppress his statement due to the trial court's prejudice and bias; and (2) there was no corroborating evidence to support his statement to the police.

¶ 10 On April 8, 2004, the court denied defendant's *pro se* motion to reconsider his sentence as being untimely filed. On April 21, 2004, the court again denied defendant's *pro se* motion to reconsider his sentence. In doing so, the following colloquy took place:

“THE CLERK: Norman Wallace, sheet 21.

THE COURT: Why is that on the call?

THE CLERK: I don't know.

THE COURT: Okay. This PC from 4/21/04. He filed a post conviction petition.

Oh, today is 4/21/04. Motion for reconsideration of sentence. This is a motion to reconsider the sentence, the second motion to reconsider the sentence.

ASSISTANT STATE'S ATTORNEY (ASA): You already heard that and denied that.

THE COURT: This is a *pro se* motion. This is a *pro se* motion. This case was originally remanded for resentencing because defendant was not given consecutive sentences and then he was resentenced on February 22nd and a motion to reconsider the sentence already heard on April the 8th of '04 which was denied.

So, the *pro se* motion to reconsider the sentence is denied. There being nothing raised in the motion that was not already considered at the time of the resentencing. As well as the time of the original sentence.

ASA: Okay

THE COURT: That's it."

¶ 11 On April 26, 2004, the circuit court clerk generated a "notice" to defendant informing him that:

"Pursuant to Illinois Supreme Court Rule 651 \*\*\*:

You are hereby notified that on April 21, 2004, the court entered an order, a copy of which is enclosed herewith. You have a right to appeal. \*\*\* [T]he appeal is to the Illinois Appellate Court in the district in which the circuit court is located. If you are indigent, you have a right to a transcript of the record of the post-conviction proceedings and to the appointment of counsel on appeal, both without cost to you. To preserve your right to appeal you must file a notice of appeal in the trial court within 30 days from the date the order was entered."

Attached to the notice is a certified report of disposition informing defendant that on April 21, 2004, “motion to reconsider denied.” Defendant did not appeal.

¶ 12 On July 15, 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition under the Act (725 ILCS 5/122-1(f) (West 2014)) and also a petition for postjudgment relief (735 ILCS 5/2-1401 (West 2014)), alleging newly discovered evidence and including supporting affidavits from three individuals, Katrina Tolbert, Tashon Toney, and Latisha Pickett. Tolbert and Toney averred that defendant was in a leg cast on the night of the murder and with his girlfriend at his sister’s home. Likewise, Pickett, defendant’s former girlfriend, also averred that defendant was in a leg cast on the night of the murder and was with her at defendant’s sister’s home where they lived.

¶ 13 On October 30, 2015, the trial court issued a written order denying defendant leave to file his successive postconviction petition and denying his petition for postjudgment relief. In the written order, the court noted that defendant’s initial postconviction petition had been denied on April 21, 2004. The court ultimately denied defendant leave to file his successive petition and his section 2-1401 petition finding defendant “has failed to present a colorable claim of actual innocence.” Defendant appeals.

¶ 14 On appeal, defendant does not challenge the denial of his motion for leave to file a successive postconviction petition or the denial of his section 2-1401 petition. Rather, he argues for the first time that his initial postconviction petition, despite the more than 10-year delay, should be remanded for second-stage proceedings because the record shows that the trial court never actually ruled on that petition. He also contends that we should vacate the court’s assessment of \$105 in fees and costs.

¶ 15 The State does not dispute that the trial court failed to rule on defendant's initial petition, but responds that he is procedurally barred from raising this claim where he did not include this issue in his motion for leave to file a successive postconviction petition. For the reasons that follow, we agree with defendant.

¶ 16 Because defendant does not challenge the court's substantive findings, we will consider only the procedural issue raised. *People v. Helgesen*, 347 Ill. App. 3d 672, 675 (2004). Whether the trial court complied with the applicable procedure is a question of law which we review *de novo*. *Helgesen*, 347 Ill. App. 3d at 675.

¶ 17 The Act provides that the circuit court adjudicates a petition for postconviction relief in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, a trial court may dismiss a petition only if it is “ ‘ frivolous or is patently without merit. ’ ” *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). The Act requires that “the trial court must, within 90 days after the filing and docketing of a postconviction petition, review the petition to determine if it is frivolous and patently without merit. This requirement is mandatory.” *People v. Harris*, 224 Ill. 2d 115, 142-43 (2007); 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not dismissed or otherwise ruled on within the 90 days, it advances to second-stage proceedings and counsel may be appointed. *Harris*, 224 Ill. 2d at 129; 725 ILCS 5/122-4, 122-6 (West 2014).

¶ 18 Here, the parties do not dispute, and we agree, that the trial court did not rule on defendant's initial postconviction petition. The record shows that on March 18, 2004, defendant filed a *pro se* motion to reconsider his sentence, which was denied by the trial court on April 8, 2004. In the meantime, on April 5, 2004, defendant filed his initial *pro se* postconviction

petition. On April 21, 2004, the court called the matter and again denied defendant's motion to reconsider, apparently believing that his initial postconviction petition was "the second motion to reconsider the sentence." As such, the trial court never ruled on defendant's initial petition and it should have advanced to second-stage proceedings. See *Harris*, 224 Ill. 2d at 129; 725 ILCS 5/122-4, 122-6 (West 2014) (if the petition is not dismissed or otherwise ruled on within the 90 days, it advances to second-stage proceedings and counsel may be appointed).

¶ 19 That said, the court nevertheless sent defendant a notice, essentially, informing him that his petition was denied and advising him of his right to appeal from a postconviction proceeding. However, attached to that notice was a certified report of disposition regarding the motion to reconsider. Defendant did not appeal the purported denial of his initial petition. See Ill. S. Ct. R. 606(a) (eff. Dec. 1, 1999); *People v. Ross*, 229 Ill. 2d 255, 263 (2008) (if the petition is dismissed at the first stage, defendant has 30 days after entry of the final judgment to appeal and confer jurisdiction on this court).

¶ 20 Rather, on July 15, 2015, he filed a *pro se* motion for leave to file a successive petition, which was denied. In his *pro se* motion, defendant did not raise the issue regarding the trial court's failure to rule on his initial postconviction petition. This is not surprising given that the court informed defendant that his petition was denied. Moreover, defendant filed the motion *pro se* and a typical *pro se* litigant usually does not draft an artful pleading. See *People v. Jones*, 213 Ill. 2d 498, 504 (2004). As pointed out by the State, the first time this procedural issue was raised is in this court, on appeal from the court's denial of defendant's motion for leave to file a successive postconviction petition. The State maintains that defendant has thus forfeited this issue. In support of this argument the State relies on *Jones*.

¶ 21 In *Jones*, the defendant entered into a negotiated guilty plea to attempted first degree murder and received a 20-year prison sentence. *Jones*, 213 Ill. 2d at 499. The defendant filed a *pro se* postconviction petition, which was summarily dismissed. *Jones*, 213 Ill. 2d at 499. The defendant appealed, contending for the first time that the circuit court erred in admonishing him pursuant to Illinois Supreme Court Rule 605 (eff. Aug. 1, 1992) and that his case should be remanded to give him an opportunity to file a motion to withdraw his plea. *Jones*, 213 Ill. 2d at 502. This court affirmed the summary dismissal and rejected the defendant's claim, finding that he could not raise the improper admonishment issue on appeal because the claim was not raised in his petition. *Jones*, 213 Ill. 2d at 502. Our supreme court affirmed, finding that this court is not free, as the supreme court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition. *Jones*, 213 Ill. 2d at 506-08. In doing so, the supreme court explained that when an appellate attorney adds a newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling, it conflicts with the nature of appellate review and the strictures of the Act. *Jones*, 213 Ill. 2d at 504.

¶ 22 Here, unlike in *Jones*, defendant is not raising a new claim on appeal that was never considered by the trial court in the course of its ruling. Rather, defendant is pointing out that the trial court in fact never ruled on his initial postconviction petition. We hesitate to apply the forfeiture rule in this situation. This is especially so where, as here, the problem defendant has encountered is not of his own making. As mentioned, the trial court did not rule on the initial petition and, as a result of some confusion, incorrectly informed defendant that his initial petition



had been denied. Although defendant did not appeal that alleged ruling, the fact remains that his initial petition was never ruled upon. Instead, defendant filed a *pro se* motion for leave to file a successive petition, which was denied. On appeal from that denial, appellate counsel raised this procedural issue. See *Jones*, 213 Ill. 2d at 504 (“it is only during the appellate process when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered”).

¶ 23 Given the procedural posture of this case, defendant has never had the benefit of first-stage postconviction proceedings. Our supreme court in *People v. Shellstrom*, 216 Ill. 2d 45, 56-57 (2005), and *People v. Pearson*, 216 Ill. 2d 58, 67 (2005), made clear that the filing of an initial postconviction petition is an action that comes with risks, including that a successive petition will be subjected to the much more stringent cause and prejudice test. In this case, defendant was subjected to that more stringent test despite the fact that his initial petition was, and is, still pending before the trial court. Accordingly, defendant seeks to have the trial court rule on his initial petition and to consider his motion for leave to file a successive petition as an amendment to that initial petition. Given the circumstances, we believe that this course of action advances substantial justice and principles of fundamental fairness.

¶ 24 In reaching this conclusion, we are not persuaded by the State’s argument that “fundamental fairness” does not permit an appellate court to review errors “never considered by the trial court in the course of its ruling.” See *Jones*, 213 Ill. 2d at 503-05; *People v. Cole*, 2012 IL App (1st) 102499, ¶ 15. In this case we are not reviewing an error that was not reviewed by the trial court in the course of its ruling because there was no ruling by the trial court. Instead, we are reviewing whether the trial court complied with the applicable legal procedure as set forth in

the Act. Both parties agree, and we concur, that by failing to rule on defendant's initial postconviction petition, the court did not comply with the Act.

¶ 25 We are likewise not persuaded by the State's argument that "when appellate counsel discovers errors not raised by their clients during the summary, first-stage postconviction proceedings, the proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged." Although this is generally true, here, there is no "newly found claim" under the Act. The "newly found claim" or "error" discovered by counsel was the procedural defect that there were no summary, first-stage postconviction proceedings as required by the Act. Moreover, it is not clear whether this procedural error is a cognizable postconviction claim that could be raised in a successive petition. That aside, had counsel opted to file a successive petition raising this error, defendant would again be subjected to the more stringent cause and prejudice test without ever having had the benefit of first-stage proceedings.

¶ 26 Accordingly, we reverse the order of the trial court denying defendant leave to file a successive petition and remand for second-stage proceedings under the Act. Having so found, we vacate the \$105 filing fee since section 22-105(a) of Code of Civil Procedure (735 ILCS 5/22-105(a) (West 2016)) refers to frivolous filings and our finding negates the assessment of the fee. See. *People v. Sparks*, 393 Ill. App.3d 878, 888 (2009).

¶ 27 Reversed and remanded; fee vacated.