

No. 1-11-2964

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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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | No. 04 CR 19761 |
| |) | |
| GARY ELLISON, |) | Honorable |
| |) | Christopher Donnelly, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in dismissing defendant's *pro se* postconviction petition at the second stage.
- ¶ 2 Defendant Gary Ellison, appearing *pro se*, appeals from the circuit court's dismissal of his *pro se* postconviction petition at the second stage and argues: (1) the trial court erred in denying his posttrial motion to suppress evidence deprived from an unlawfully authorized electronic surveillance evidence; (2) he is entitled to an evidentiary hearing based on the State's failure to file an amended motion to dismiss; and (3) 14 claims of denials of his constitutional rights

ranging from the State's withholding of exculpatory evidence to ineffective assistance of appellate counsel. For the following reasons, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Defendant was convicted on ten counts of first degree murder for his role in the abduction and death of Robert Pierce in February 2001. Pierce's body was found partially submerged in the Calumet River. His head was covered with a plastic bag, his hands tied together with duct tape and there were metal weights tied around his neck and ankles. The testimony at trial was lengthy. A full recitation of the facts can be found in our order affirming defendant's conviction on appeal. *People v. Gary Ellison*, No. 1-06-1842 (unpublished order under Supreme Court Rule 23) (June 16, 2008). Defendant's leave to appeal to the Illinois Supreme Court was denied on January 28, 2009. *People v. Ellison*, 231 Ill. 2d 640 (2009).

¶ 5 Defendant filed a *pro se* postconviction petition on November 8, 2009, alleging over 52 purported claims of constitutional violations. Many of defendant's claims focused on allegations that the State failed to disclose evidence from the department of corrections regarding an informant's conversations with defendant and failed to disclose an audiotape of a confidential informant. Defendant also alleged ineffective assistance of trial and appellate counsel and that the State failed to establish that a DNA sample was obtained from him. The State filed a motion to dismiss the petition on January 14, 2011. On the same date, defendant argued a posttrial motion to suppress evidence, seeking to suppress an alleged recording of a conversation between defendant and a confidential informant. The trial court denied that motion as untimely. Defendant filed an amended *pro se* postconviction petition on May 20, 2011. The State did not file an additional response to defendant's amended claims as his claims were repetitive of the

ones raised in the initial petition.

¶ 6 The court granted the State's motion to dismiss petitioner's amended *pro se* petition on September 16, 2011. The appeal followed.

¶ 7 ANALYSIS

¶ 8 Defendant first argues that the trial court erred in denying his posttrial motion for suppression as untimely. The notice of appeal in the instant case establishes that defendant is appealing from the court's September 6, 2011 order "dismissing the Amended Petition for Post Conviction Relief in regard to Ellison v. State of Illinois, 04 CR 1976101. (AMENDED PETITION FOR POST CONVICTION RELIEF)" and not the January 14, 2011, order denying defendant's posttrial motion to suppress.

¶ 9 Illinois Supreme Court Rule 303(b) (eff. June 4, 2008) requires that a notice of appeal specify the judgment or other orders appealed from. A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal. *People v. Smith*, 228 Ill.2d 95, 104 (2009). Because defendant did not include the January 14, 2011, order as part of his notice of appeal, we lack the jurisdiction necessary to consider defendant's argument.

¶ 10 Defendant next argues that the court erred in dismissing his *pro se* amended petition at the second stage where the State did not file an amended motion to dismiss and instead stood on its initial motion to dismiss. The Illinois Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) 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 2008). 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).

¶ 11 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)). 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 2008); *Coleman*, 183 Ill. 2d at 385. If the trial 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 2008).

¶ 12 At the second stage, the State is required to either answer the post-conviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2008). As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the allegations contained in the petition, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). As we review this case at the second stage, our inquiry is whether the allegations raised by petitioner in his petition, supported by records and other documents, demonstrate a substantial violation of petitioner's constitutional rights. *Edwards*, 197 Ill. 2d at 245-46. The standard of review we apply to the circuit court's dismissal of petitioner's petition is *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

¶ 13 Defendant argues that the trial court erred in not requiring the State to file a written answer to defendant's amended *pro se* postconviction petition. Defendant claims that he raised issues in his amended petition that were not raised in this original *pro se* petition so the State's motion to dismiss, filed in response to his original petition, did not contain all of the bases for dismissal.

¶ 14 Pursuant to section 122–2.1(b) of the Act, if a petition is not summarily dismissed at the first stage, it advances to the second stage, where “the court shall order the petition to be docketed for further consideration in accordance with Sections 122–4 through 122–6.” 725 ILCS 5/122–2.1(b) (West 2008). According to section 122–5, the State must answer or move to dismiss a petition within 30 days after the entry of an order pursuant to section 122–2.1(b) or “within such further time as the court may set.” 725 ILCS 5/122–5 (West 2008).

¶ 15 In this case, defendant's *pro se* postconviction petition was advanced to the second stage and docketed on March 5, 2010. The State was granted several continuances to respond to the petition, without objection, and ultimately filed a motion to dismiss on January 14, 2011. Defendant filed an amended *pro se* postconviction petition on May 20, 2011. The State did not file an amended motion to dismiss, instead choosing to stand on the motion to dismiss filed on January 14, 2011. On September 16, 2011, the State argued its motion to dismiss, and petitioner responded. The court granted the State's motion to dismiss that same day.

¶ 16 Defendant cites several cases, including *People v. Oury*, 259 Ill. App. 3d 663 (1994), and *People v. Cartee*, 86 Ill. App. 3d 895 (1980), to support his argument that the State was required to file an amended motion to dismiss in response to his amended *pro se* postconviction petition.

¶ 17 We find *Oury* factually distinguishable from the instant case because the issue in *Oury*

was whether the trial court could appoint counsel and consider the State's motion to dismiss at the first stage of the proceedings. *Oury*, 259 Ill. App. 3d at 669. *Cartee* is equally distinguishable. Defendant Cartee argued that he was entitled to a reversal of his conviction based on the State's delay in filing a written answer to his postconviction petition, although the court had granted the State several continuances to do so. The *Cartee* court rejected defendant's argument finding, "the continuances granted to the State were within the discretion of the trial court, since the statute is not couched in mandatory language." *Cartee*, 86 Ill. App. 3d at 899.

¶ 18 Defendant here is not complaining that the State did not file its answer to his postconviction petition in a timely manner. Rather, defendant contends that the State was required to submit an amended motion to dismiss in response to his amended *pro se* postconviction petition. Defendant has cited no authority for this proposition, nor do we find that the Act so requires. We therefore find that defendant's argument is without merit.

¶ 19 Defendant next claims that the court erred in dismissing his amended petition as the petition sufficiently set forth a violation of his constitutional rights. Defendant raises numerous claims in this court, some of them duplicative, to establish that his constitutional rights were violated, including: (1) the State used false testimony to convict him; (2) the State withheld an exculpatory court order subject to mandatory disclosure; (3) the State suppressed an exculpatory court order stemming from electronic surveillance; (4) trial counsel was ineffective for failing to investigate defendant's interrogation in prison, failing to challenge inadmissible evidence derived therefrom, failing to uncover evidence impeaching a government witness, and for failing to investigate or obtain material recordings testified to by a detective ; (5) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness based on his lack of challenge to the

admission of a witness's testimony, failing to challenge the State's introduction of prejudicial evidence based on recordings not disclosed, and for failing to challenge inadmissible DNA evidence; (6) the trial court failed to resolve the dispute as to whether the court authorized recordings that were produced by police; (7) the State suppressed material recordings requested; (8) the State knowingly used false testimony to convict him; (8) the State suppressed material recordings impeaching two witnesses; and (9) the cumulative effect of these errors amounted to an unfair trial.

¶ 20 Illinois Supreme Court Rule 341(h)(7) requires that an appellant's brief “contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on.” Ill. S.Ct. R. 341(h)(7). “[I]t is well settled that * * * bare contentions that fail to cite any authority do not merit consideration on appeal.” *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25. Although defendant generally cites to *People v. Coleman*, 183 Ill. 2d 366 (1998), in support of his argument on this issue, he fails to meet the directive of *Coleman* that his claims of State and Federal constitutional violations must be supported by affidavits that show his claims have merit. *Id.* at 380. Further, on appeal Defendant cited no authority to support any of the arguments relating to the substance of his postconviction petition in his opening brief or in his reply brief. Defendant has therefore forfeited review of these issues and we decline to address them. Defendant's *pro se* status has no bearing on our decision where the rule of forfeiture is not relaxed for *pro se* defendants. *People v. McCarter*, 385 Ill. App. 3d 919. 937-38 (2008).

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court is affirmed.

1-11-2964

¶ 23 Affirmed.