

No. 1-12-2933

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 27066
)	
STEPHAN SPENCER,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The amended filing by a post-conviction petitioner restarted the 90-day period in which the circuit court was required to rule on the petitioner's claims, pursuant to *People v. Watson*, 187 Ill. 2d 448 (1999), and therefore the court's summary dismissal of the petition within that period was timely; the judgment of the circuit court is affirmed.
- ¶ 2 Defendant Stephan Spencer appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)).
- On appeal, defendant contends his petition should be remanded for second-stage post-conviction

proceedings because the circuit court did not rule on his filing within the 90-day period mandated by the Act. We affirm.

¶ 3 Following a jury trial in 2007, defendant was convicted of the attempted murder of Nicola Graham, the home invasion of Graham's residence, and the aggravated battery of Graham's 10-year-old daughter. At trial, Graham described those crimes, which occurred on November 1, 2005, and said defendant was her former boyfriend at that time. About a week before the charged offenses, defendant broke into Graham's home while she slept but left without harming her. In the early morning hours of November 1, 2005, Graham was awakened by a plate being broken across her face. While the two struggled to gain control of a knife, Graham removed the mask defendant wore. Defendant stabbed Graham in the back and also chased and caught Graham's daughter, holding the girl in a headlock at one point. Graham required plastic surgery for her injuries.

¶ 4 Defendant was convicted and sentenced to consecutive prison terms of 25 years, 20 years and 5 years, respectively, for those offenses. On appeal, this court affirmed. *People v. Spencer*, No. 1-08-0326 (2011) (unpublished order under Supreme Court Rule 23).

¶ 5 On November 16, 2011, defendant mailed to the circuit court a *pro se* post-conviction petition. Defendant's petition was file stamped and docketed by the clerk's office on December 5, 2011. In that petition, defendant claimed, *inter alia*, that his trial counsel was ineffective for failing to impeach Graham's trial testimony with the testimony of Fred Jones. Defendant asserted Jones would have testified that on an unspecified day in 2005, he helped defendant move Graham's items into her new home, which would have impeached Graham's account that she and defendant were no longer in a relationship around the time of the offense.

¶ 6 Defendant mailed an amended *pro se* post-conviction petition that was received by the clerk's office on December 12, 2011 and was file stamped on December 16, 2011. The amended petition was accompanied by a written statement from Jones that he helped defendant move some items into Graham's house and that defendant told Jones he and Graham were getting married. Jones's written statement, which was not notarized, did not indicate when those activities and statements occurred.

¶ 7 On March 14, 2012, the circuit court dismissed defendant's post-conviction claims as either forfeited or frivolous and patently without merit. The court determined the signed statement from Jones did "not constitute an affidavit" because it was not sworn to before a notary. The court also noted defendant did not submit affidavits from the other potential witnesses who he claimed would have impeached the victim's testimony. Defendant now appeals that ruling.

¶ 8 On appeal, defendant contends this court must remand for further post-conviction proceedings because the circuit court did not consider his claims within the 90-day time period required by the Act. He asserts the circuit court was required to rule on his post-conviction claims within 90 days of the filing of his initial petition on December 5, 2011, and that the court's ruling 100 days later, on March 14, 2011, requires that his petition be docketed for further post-conviction proceedings.

¶ 9 The State responds that defendant's filing of an amended post-conviction petition on December 16, 2011, restarted the 90-day period in which the circuit court could rule on defendant's claims. We note that the circuit court dismissed the petition 89 days after that date, on March 14, 2012, which would make the court's ruling timely under the State's analysis.

¶ 10 A post-conviction proceeding is "commenced by filing [a petition] with the clerk of the court in which the conviction took place." 725 ILCS 5/122-1(b) (West 2010). Within 90 days of the filing and docketing of each petition, the circuit court "shall examine such petition and enter an order thereon." 725 ILCS 5/122-2.1(a) (West 2010). The 90-day time requirement in section 122-2.1(a) is "mandatory, not directory." *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). If the circuit court does not enter a summary dismissal within 90 days, the court may not do so at all, and the petition instead must advance to additional proceedings under the Act. *Id.*

¶ 11 The court must dismiss the petition at the first stage of review if it determines the petition to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). Summary dismissal of a petition as frivolous or patently without merit is appropriate where the petition is unsupported by "affidavits, records, or other evidence." 725 ILCS 5/122-2 (West 2010); see *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (the failure to attach the necessary documentation or explain its absence justifies the petition's summary dismissal).

¶ 12 Our supreme court has recognized the ability of a post-conviction petitioner to amend a petition at any point until the circuit court has ruled upon the petitioner's claims. In *People v. Watson*, 187 Ill. 2d 448, 450 (1999), the supreme court held that a defendant's filing of an amendment to a post-conviction petition restarts the 90-day period in which the circuit court may dismiss the petition as frivolous or patently without merit. See also *People v. Ceja*, 381 Ill. App. 3d 178, 182 (2008); *People v. Scullark*, 325 Ill. App. 3d 876, 889 (2001); *People v. Douglas*, 296 Ill. App. 3d 192, 195-96 (1998).

¶ 13 In *Watson*, the defendant filed a *pro se* petition for post-conviction relief on May 31, 1996. *Watson*, 187 Ill. 2d at 450. In that petition, he sought leave to file an amended petition,

which the circuit court granted. *Id.* The defendant's amended petition was filed on August 30, 1996, and the circuit court ruled on the petition on September 5, 1996. *Id.* In rejecting the defendant's claim that his petition was not ruled on within 90 days of its filing, the supreme court held that section 122-5 of the Act authorizes a court to allow amendments to a post-conviction petition, and the court observed that it "would be unreasonable to authorize the court to allow amendments to the petition and yet require the court to rule on the petition within the period remaining for consideration of the original petition." *Id.* at 451. The court noted that if the 90-day period did not restart upon an amendment to a petition, a post-conviction petitioner would be able to delay the filing of affidavits or other materials to truncate the time period in which the circuit court could consider those filings. *Id.* Similarly, in *Douglas*, which was decided before *Watson*, the appellate court concluded that when a defendant files an amended or supplemental post-conviction petition, "the date on which the defendant filed his original petition cannot begin the running of the 90-day period under section 122-2.1(a) of the Act." *Douglas*, 296 Ill. App. 3d at 195.

¶ 14 Defendant acknowledges that authority but contends that *Watson* and *Douglas* do not squarely address the situation at bar, where his amended petition did not raise any new claims but was merely "rejected as a nullity" based on the lack of notarization of Jones's statement. Defendant argues that unlike the amended petition in *Douglas* in which the petitioner raised claims that were not included in the initial petition, his amended filing in this case only sought to lend support to the claim in his original petition via Jones's statement.

¶ 15 The restarting of the 90-day period upon the filing of an amended post-conviction claim applies equally to the facts at bar as it did to the filings in *Douglas*. The Act makes clear that

summary dismissal of a petition is required where the petition is unaccompanied by affidavits or other documents supporting the claims therein. 725 ILCS 5/122-2 (West 2010); *Collins*, 202 Ill. 2d at 66. Therefore, if defendant offers supporting documents after the initial filing, the petition is amended to include those items, and the court has 90 days from that date to consider the petition. Whether the amended filing included a new claim, as in *Douglas*, or only consists of an affidavit in support of a claim set out in the original petition, as is the case here, the circuit court is required to consider the content of the submission to determine whether the claims contained in the petition are frivolous or patently without merit.

¶ 16 Defendant concedes that because Jones's affidavit was not notarized, his amended petition ultimately had no legal effect. He argues the circuit court therefore only was required to consider the merits of the original petition and should have done so within 90 days of his initial filing on December 5, 2011. Not only is defendant's suggestion contrary to the supreme court's holding in *Watson* requiring that the circuit court be given a full 90 days to consider amendments to a petition, defendant cannot overcome the non-meritorious nature of his original filing. See *Collins*, 202 Ill. 2d at 66 (the failure to attach necessary affidavits or to explain their absence is fatal and by itself justifies the petition's summary dismissal).

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.