

No. 1-13-1302

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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. 08 CR 14499
)	
MATTHEW RISTAU,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court erred when it summarily dismissed defendant's postconviction petition after the mandatory 90-day statutory time limit under the Post-Conviction Hearing Act had lapsed as it was not a successive petition.

¶ 2 Defendant, Matthew Ristau, appeals from an order of the circuit court, which considered his postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), as a successive postconviction petition and dismissed it as frivolous and patently without merit. On appeal, defendant argues that the circuit court erred in considering his petition as successive. Defendant also argues that, because the order dismissing his petition was entered more than 90 days after its filing, the order should be reversed and the matter

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remanded for second stage proceedings. We reverse the order of dismissal and remand this cause for further proceedings under the Act.

¶ 3 On July 30, 2009, defendant, while represented by an Assistant Public Defender (APD), entered into a negotiated plea of guilty to the charge of attempted first degree murder in exchange for a sentence of 20 years' imprisonment.

¶ 4 On October 30, 2009, the matter was before the circuit court, but defendant was not present. At that time, the State informed the circuit court that defendant had filed a *pro se* motion to withdraw his guilty plea and was claiming that the APD had forced him to plead guilty. Based on defendant's claims, the court appointed a different APD to represent defendant. The motion to withdraw the guilty plea is not in the record. The half-sheet notation for October 30, 2009 states that the *pro se* motion to withdraw his guilty plea was timely filed. The court set the matter for December 9, 2009, and ordered that a writ issue for defendant's appearance.

¶ 5 On December 9, 2009, the APD stated that he intended to file a "renewed motion for withdrawal of guilty plea," and an affidavit. The circuit court continued the case to January 22, 2010.

¶ 6 On January 22, 2010, the APD told the court that he had reviewed the transcript of the plea proceedings, the files of the original APD, discussed the plea proceedings with her and, also, had discussions with defendant. Defendant insisted on going forward with the motion to withdraw his guilty plea. The APD requested a continuance to obtain an affidavit from defendant. The circuit court continued defendant's case to March 12, 2010, and then to April 16, 2010.

¶ 7 On April 16, 2010, the APD informed the circuit court that defendant wished to withdraw the motion to withdraw his guilty plea. The circuit court, after a discussion with defendant, allowed him to do so.

¶ 8 As relevant to subsequent proceedings, the record on appeal contains a document entitled: "Affidavit in Support of Postconviction Action" (affidavit). The affidavit, signed by defendant, was notarized on July 7, 2010, and has four short paragraphs. In the affidavit, defendant begins by stating: "I, MATTHEW RISTAU, in support of my previous attempt to go forth with my motion to withdraw guilty plea, hereby swear and attest to the following: ***." In paragraph 3, defendant stated that he felt "tremendous pressure to withdraw [his] motion [to withdraw his guilty plea]" from the office of the Public Defender. Additionally, defendant asserted that he had not received complete transcripts of "my motions and the ruling of my motion to suppress statements" by the time the affidavit was executed; that on April 16, 2010 (the date he first withdrew his motion to withdraw), he was battling with "severe mental illness;" and that there were witnesses who would testify that the officers' sworn testimony was "impeachable and incorrect."

¶ 9 The record also includes a handwritten letter dated July 6, 2010, in which defendant requests that the circuit court direct the prison warden to allow him more time in the law library.

¶ 10 The affidavit and letter are not file-stamped. Neither the affidavit, nor the letter, include a proof of service or notice of filing.

¶ 11 On August 31, 2010, defendant appeared in court *pro se* before a different judge. That judge told defendant: "I see that you have filed a motion" and asked him "is that correct?" Defendant responded that, after receiving some transcripts, he had sent "some things" to the APD for him to "look over and see, you know, what he would think." Defendant told the court that he

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did not wish to withdraw his guilty plea. Defendant also stated, multiple times, that he had "no motions pending in front of [the trial judge]," and he did not wish to come back to court. The judge referred to "point 3" in defendant's "motion" that said defendant felt "tremendous pressure" to withdraw his motion to withdraw his guilty plea. Defendant confirmed that, despite that allegation, he had pled guilty of his own free will. Defendant also stated that he was missing the transcripts of certain trial proceedings, and requested the transcripts "for [peace] of mind."

¶ 12 Over defendant's objection, the circuit court continued the matter to September 3, 2010, for defendant to appear before the judge who had presided over his plea to determine if there were any pending motions. The half-sheet handwritten notation for August 31, 2010, states: "D files PC Motion to Withdraw."

¶ 13 On September 3, 2010, defendant appeared before the judge who had presided over this case. The circuit court noted that defendant had "filed a couple of things," including a request for additional time in the law library at the jail. As to that request, the circuit court signed a blank form order which asked that the warden consider giving defendant additional library time. The circuit court then inquired of defendant: "What's the other thing?" In response, defendant explained that he had not received the complete transcripts as to his motion to suppress. The matter was subsequently continued to September 17, 2010, as a status on defendant obtaining the transcripts. The circuit court stated that defendant did not need to appear in court as to the transcripts, as defendant was reluctant to continue to return to court. The affidavit itself was never discussed during the proceedings.

¶ 14 On September 17, 2010, the matter was again continued to October 15, 2010. On that date, without defendant present, the APD, apparently referring to the affidavit, informed the court that defendant was now claiming to have been coerced into withdrawing his motion to

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withdraw his guilty plea. The case was continued to November 19, 2010, and then to January 14, 2011.

¶ 15 On January 14, 2011, the APD appeared in court; defendant was not there. The APD stated that he had been "told" that, in August, defendant had filed a motion to withdraw his guilty plea claiming to have been pressured by the APD into withdrawing his motion to withdraw his guilty plea and that, at that time, he was suffering from a mental illness. The circuit court inquired whether counsel "formalized [defendant's] motion to withdraw his plea." The APD confirmed that "[i]t's in the record." The APD, apparently, was referring again to the affidavit. The circuit court granted the APD's request to withdraw as counsel based on defendant's claims against him and subsequently appointed yet another APD to represent defendant.

¶ 16 On April 6, 2011, the newly appointed APD appeared in court and stated that he had met with defendant and that defendant "was unequivocal that he did not wish to withdraw his guilty plea." Defendant was not present. The circuit court then stated it would allow defendant to withdraw what was referred to as his second motion to withdraw his guilty plea.

¶ 17 On September 18, 2012, defendant mailed a motion for extension of time to file his postconviction petition. This motion is file-stamped September 27, 2012, and includes a proof of service.

¶ 18 On September 24, 2012, defendant mailed a *pro se* postconviction petition (petition) and attached a motion to withdraw his guilty plea and affidavit in support, alleging actual innocence and ineffective assistance of trial counsel for failure to adequately investigate and develop a defense. The petition also alleged that defendant: had been coerced by trial counsel into pleading guilty; felt pressured to plead guilty based upon the admonishments of the trial court regarding the applicable sentence should he proceed to trial and; that he was pressured by "two public

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defenders" on two separate occasions to withdraw his motion to withdraw his guilty plea. The petition was file-stamped on September 24, 2012 and had a proof of service.

¶ 19 Defendant, on December 7, 2012, mailed a motion requesting that his petition be advanced to the second stage and counsel be appointed because 90 days had lapsed since the filing of the petition. The motion was file-stamped; January 3, 2013, and had a proof of service.

¶ 20 Defendant mailed a similar motion with proof of service on December 20, 2012, which was file-stamped January 15, 2012.

¶ 21 The case appeared on the circuit court's call on January 22, 2013. The transcript of proceedings does not indicate the parties were present. The only statement transcribed was that of the circuit court stating: "This is a successive post-conviction petition. It's entered and continued; order of the court, March 27."

¶ 22 On March 27, 2013, the matter was called by the clerk and the circuit court dismissed the petition stating that it was "a second successive post-conviction petition" and was "frivolous and without merit." The transcript does not indicate the parties were present. In its written order the circuit court stated that defendant had filed his first postconviction petition on August 31, 2010, (the court date where the affidavit was first before the court) and "that the record was 'unclear as to the disposition' of that petition." This appeal followed.

¶ 23 On appeal defendant alleges that the circuit court's summary dismissal of his petition was improper because the circuit court considered the petition as a successive one. It appears from the circuit court's written order dismissing the petition that it had considered the affidavit as defendant's first postconviction petition.

¶ 24 There are three stages of the postconviction process. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court must review the postconviction petition

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within 90 days from the date of its filing and independently make a determination whether the petition is frivolous or is patently without merit. *Id.*; see also 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court determines the petition is frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* The 90-day time period requirement set forth in section 122-2.1(a) is mandatory, not directory. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). A court's noncompliance with the time requirement renders any summary dismissal void (*id.*), and a remand for a second-stage hearing is required. *People v. Perez*, 2013 IL App (2d) 110306, ¶ 28, *aff'd* 2014 IL 115927. At the second stage, counsel is appointed to represent the defendant. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The State may either answer, or move to dismiss the petition. *Id.* The summary dismissal of a defendant's postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 25 Generally, without leave of court, a defendant is limited to filing only one postconviction petition. 725 ILCS 5/122-1(f) (West 2012). The 90-day time limit for summary dismissal of defendant's first postconviction petition does not apply to successive petitions until the circuit court grants leave to file the subsequent petition. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007).

¶ 26 The parties do not dispute that the circuit court's dismissal of the petition would be untimely if it were defendant's initial petition under the Act. 725 ILCS 5/122-2.1(a)(2) (West 2012). We agree. The record shows that the petition was filed on September 24, 2012, but was not ruled upon until March 27, 2013, almost six months later.

¶ 27 While defendant argues that the petition is his first postconviction petition under the Act, the State argues that the circuit court properly considered the affidavit as defendant's first postconviction petition and, accordingly, the petition is, in fact, a successive petition.

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¶ 28 On August 31, 2010, when the affidavit first came to the attention of the circuit court, defendant informed the court that he did not file the affidavit himself, nor did he request that it be filed by the APD on his behalf. Defendant stated, on the record, that he sent the affidavit to the APD for review and to see what he thought. Defendant's statements are corroborated by the facts that the affidavit is not filed stamped and has no proof of service. In contrast, the petition and defendant's subsequent motions were all file-stamped and included proofs of service. Additionally, defendant unequivocally and repeatedly informed the circuit court, on that date, that he was not seeking to withdraw his guilty plea and had no pending motions.

¶ 29 When the matter was next in court before the judge who had presided over his case, the affidavit was not mentioned; only defendant's requests for additional time at the prison law library and for the missing transcripts were discussed. At the subsequent court dates, defendant, having been excused at his own request, was not present in court when the circuit court and the APDs referred to the affidavit as a second motion to withdraw his plea. Defendant was not present in court on April 6, 2011, when the APD informed the court that defendant wished to withdraw his motion to withdraw his guilty plea and the circuit court referred to the affidavit as a second motion to withdraw his guilty plea. Further, defendant was not in court on January 22, 2013, when the circuit court described the petition as a successive one.

¶ 30 A trial court may consider a *pro se* pleading which alleges a deprivation of constitutional right cognizable under the Act as a postconviction petition. See *People v. Shellstrom*, 216 Ill. 2d 45, 52-53 (2005). The "recharacterization is allowed even where the *pro se* pleading is clearly labeled." *Id.* at 51. The "recharacterization enables the issues to be properly framed," and prevents a *pro se* litigant from selecting an improper method for attacking a conviction. *Id.*

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¶ 31 However, if a circuit court recharacterizes a *pro se* pleading as a first postconviction petition, the circuit court "must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has." *Id.* at 57. If the admonishment is not made, "the pleading cannot be considered to have become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions." *Id.*

¶ 32 At no time was defendant admonished that the affidavit had been recharacterized as a postconviction petition, or that the recharacterization would mean that a subsequent petition would be treated as a successive petition. In fact, the record does not show defendant was in court when the affidavit was being treated as a second motion to withdraw his plea, or as an initial petition, under the Act. Defendant was in court on August 31, 2010, when he stated that he had not filed the affidavit, did not have any pending motions, and was not seeking to withdraw his guilty plea.

¶ 33 In conclusion, we find that the instant petition was not a successive petition, but an initial one under the Act, and the circuit court had 90 days to summarily dismiss it. See 725 ILCS 5/122-2.1(a)(2) (West 2012). Because the circuit court dismissed the petition approximately six months after its filing, we must reverse the dismissal order and remand the cause for further proceedings in accordance with the Act. See 725 ILCS 5/122-4, 122-5, 122-6 (West 2012); *People v. McCaskill*, 2012 IL App (1st) 110174, ¶¶ 11, 16.

¶ 34 Reversed and remanded.