

No. 1-12-1297

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.

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 10737
	)	
SHAWN MILLER,	)	The Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 Held: We affirmed the order summarily dismissing defendant's *pro se* postconviction petition within 90 days of its filing where the dismissal order implicitly denied defendant leave to file his *pro se* amended postconviction petition which had been received by the clerk's office prior to the dismissal order and that denial was not an abuse of discretion.

¶ 2 Defendant, Shawn Miller, appeals from an order of the circuit court of Cook County which summarily dismissed his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). The postconviction petition was docketed as filed on January 12, 2012, and dismissed on March 29, 2012, in a written order. Defendant, on

appeal, raises no substantive issue regarding the dismissal of his *pro se* postconviction petition. Defendant does argue that because the circuit court failed to rule on his amended *pro se* postconviction petition, which was mailed to the clerk of the circuit court of Cook County (clerk's office) on February 17, 2012, within 90 days of "it's filing," we must remand the matter for second-stage proceedings. We affirm the dismissal.

¶ 3 Following a 2008 bench trial, defendant was convicted of the second-degree murder of Kwane Edwards and the heinous battery of Bernice Sipes, and was sentenced to respective consecutive terms of 20 and 40 years' imprisonment. Defendant entered the home of Ms. Sipes, his former girlfriend, without permission. Defendant threw hot grease on Ms. Sipes. During a fight with Mr. Edwards, defendant stabbed Mr. Edwards, who died of the stab wounds. This court affirmed that judgment on direct appeal in *People v. Miller*, No. 1-09-0213 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 On December 29, 2011, defendant mailed from prison a *pro se* postconviction petition (initial petition) with supporting affidavits. The initial petition alleged: (1) various claims of ineffectiveness of trial counsel; (2) there had been no valid waiver of the jury; and (3) the State failed to prove defendant guilty beyond a reasonable doubt of heinous battery. Defendant further contended that the State's failure to disclose the victim's police reports and other exculpatory evidence amounted to a violation under *People v. Brady*, 369 Ill. App. 3d 836 (2007)). This initial petition was stamped filed on January 12, 2012.

¶ 5 On February 17, 2012, while in prison, defendant mailed an amended *pro se* postconviction petition (amended petition) to the clerk's office and the Office of the Cook County State's Attorney. In his amended petition, defendant preliminarily stated that he wished to amend his initial petition with the allegations included therein. The amended petition set forth

that: his heinous battery and second-degree murder convictions were based on insufficient and inconsistent evidence; his second-degree murder conviction should be reduced because there was evidence supporting self-defense; the State improperly commented on the credibility of its witnesses and cross-examined defendant on his prior convictions; his heinous-battery sentence was excessive; and the trial court erred in granting continuances of his case, thereby violating his right to a speedy trial. In conclusion, defendant prayed that his amended petition "be allowed and granted."

¶ 6 The common law record includes a preprinted form labeled "Notification of Motion" (form) which includes notations that the amended petition was "received" on March 12, 2012, and "entered in the computer" on March 20, 2012. The form also states: "Date to be heard: 3-29-12." It appears the form was completed by the clerk's office. The court's half-sheet, however, does not include any reference to defendant's amended petition.

¶ 7 On March 29, 2012, the circuit court summarily dismissed defendant's postconviction petition "which was filed on December 30, 2011 [sic]," in a written, 11-page order, and assessed defendant filing fees and actual costs in the amount of \$105. In its written order, the circuit court expressly found defendant's claims had been waived or barred by the doctrine of *res judicata* based on the judgment entered in his direct appeal. The circuit court further found defendant's claims were frivolous and patently without merit, thus warranting the imposition of \$105 in fees and costs. The written dismissal order does not refer to the amended petition, nor the additional claims raised therein.

¶ 8 According to the transcript of the March 29, 2012, proceedings, the circuit court stated: "Court is issuing a written order. This is the Petitioner Shawn Miller's post-conviction petition requesting relief from the judgment of conviction against him on December 11, 2008." The

circuit court then briefly outlined its decision which was embodied in the written order of dismissal and made no mention of the amended petition. The half-sheet indicates defendant was not present in court on that date; defendant was in custody at that time.

¶ 9 On April 17, 2012, defendant filed a notice of appeal from the dismissal order.

¶ 10 On appeal, defendant argues this cause should be remanded for second-stage proceedings because the circuit court failed to consider and rule on the merits of his timely-filed amended petition within 90 days of "its filing." He also maintains that if this matter is advanced for second-stage proceedings, this court should vacate the circuit court's order which required the withdrawal of the filing fees from his trust account, and direct the Illinois Department of Corrections (IDOC) to reinstate any good-time credit which had been revoked due to the filing of his petition.

¶ 11 The Act provides a means by which a defendant may challenge his conviction or sentence where there have been violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill 2d 458, 471 (2006). In noncapital cases, there is a three-stage process for the adjudication of a defendant's postconviction petition. *People v. Chester*, 2014 IL App (4th) 120564, ¶ 15. At the first stage of postconviction proceedings, the circuit court, under the Act, has 90 days to review a petition and may summarily dismiss the petition if the court finds the allegations are frivolous and patently without merit. *Pendleton*, 223 Ill 2d at 472; 725 ILCS 5/122-2.1(a)(2) (West 2012). The 90-day period begins to run when the petition is filed and docketed. 725 ILCS 5/122-2.1(a)(2) (West 2012). "The 90-day time requirement is mandatory and a trial court's noncompliance with the time requirement renders a summary dismissal order void." *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010). If the petition is not dismissed within the 90-day period, the petition proceeds to the second stage of consideration under the Act and counsel will

be appointed. *Id.* at 114; 725 ILCS 5/122-2.1(b), 122-4 (West 2012). Our review of a first-stage summary dismissal is *de novo*. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 19.

¶ 12 We initially observe that because defendant has not raised any arguments in support of the substance of his claims (in both the initial and amended petitions), he has forfeited any such arguments for review. *Pendleton*, 223 Ill. 2d at 476. Instead, defendant proceeds solely on his argument that the circuit court's failure to consider his amended petition within 90 days requires a remand for second-stage proceedings.

¶ 13 The Act generally contemplates the filing of one postconviction petition. *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20. However, a defendant may request leave to amend a postconviction petition, or seek leave to file a successive petition. *Id.*, ¶ 20, 23. Section 122-5 of the Act (725 ILCS 5/122-5 (West 2012)), provides that the court may allow amendments to postconviction petitions "as is generally provided in civil cases" (*People v. White*, 2013 IL App (2d) 120205, ¶ 9), and states:

"The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petition *** as shall be appropriate, just and reasonable and as is generally provided in civil cases. 725 ILCS 5/122-5 (West 2012).

¶ 14 " 'Generally, when a party asks to amend a [postconviction pleading], leave to do so is freely given.' " *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 57 (quoting *People v. Brown*, 336 Ill. App. 3d 711, 716 (2002)). During the first stage of postconviction proceedings, if an amendment is allowed, and the amended petition is filed prior to the dismissal of the original petition and within the 90-day period of review, a new 90-day period is triggered. *People v. Watson*, 187 Ill. 2d 448, 451 (1999); *People v. Harris*, 224 Ill. 2d 115, 129-30 (2007). A trial

court will reverse a ruling on a motion for leave to amend a postconviction petition only when there has been an abuse of discretion. *Id.* at 123 (citing *People v. Washington*, 256 Ill. App. 3d 445, 449 (1993)).

¶ 15 Here, defendant's initial petition was stamped as filed on January 12, 2012. Before the court ruled on his initial petition and during the 90-day statutory review period, defendant, on February 17, 2012, mailed the amended petition from prison. The amended petition was received by the clerk's office on March 12, 2012, and entered in its computer on March 20, 2012. Although defendant did not file a formal motion for leave to amend his initial petition, he did set forth in the amended petition that he was seeking to amend his initial petition and requested that the amendment be allowed. The Act does not require a formal motion for leave to file an amended petition (725 ILC 5/122-5 (West 2012)), and, thus, under the particular circumstances of this case, defendant sufficiently raised his request for leave to file an amended petition. Defendant's argument on appeal is that the amended petition triggered a new 90-day period beginning on March 20, 2012 (the date it was entered in the clerk's office computer), and that because the trial court never ruled on the amended petition, his cause must be remanded to the trial court for second-stage proceedings. Defendant, however, was never given leave to file the amended petition within the 90-day period of review from the filing of the initial petition and, therefore, a new 90-day period was not triggered under *Watson* (where the defendant requested and was given leave to file, and did file an amended petition within the 90-day review period); see also *People v. Volkmar*, 363 Ill. App. 3d 668, 673 (2006) (where court concluded 90-day period could be extended under *Watson* only if an amendment to the petition occurred during the initial 90 days).

¶ 16 The March 29, 2012, written order of dismissal did not reference the existence of defendant's amended petition, nor the newly raised allegations contained therein. The dismissal order was a final judgment. *Harris*, 224 Ill. 2d at 121. Defendant, after the dismissal, had no statutory right to amend his petition. *Smith*, 2013 IL App (4th) 110220, ¶ 23. After a dismissal at the first stage, a defendant has two choices—file a motion to reconsider that dismissal, or challenge the dismissal on appeal. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2006). Defendant chose to appeal the dismissal.

¶ 17 Where the trial court dismisses a postconviction petition without first considering defendant's request to amend the petition, the denial of the request to amend may be considered implicit. *Harris*, 224 Ill. 2d at 139; *Chester*, 2014 IL App (4th) 120564, ¶ 25. The implicit denial of the leave to amend the postconviction petition is subject to an abuse of discretion review. *Harris*, 224 Ill. 2d at 139; *Chester*, 2014 IL App (4th) 120564, ¶ 26. We may, therefore, consider the dismissal order of March 29, 2012, as having implicitly denied defendant leave to file the amended petition and we will review that denial for an abuse of discretion.

¶ 18 Defendant, in his opening brief, did not argue the trial court committed an abuse of discretion. In his reply brief, defendant, citing *Brown*, stated: "The issue here is not whether the trial court abused its discretion in allowing or rejecting the amendments, but whether the discretion was ever exercised at all." We disagree with defendant's reading of *Brown*, and his assertion that the relevant inquiry is not an abuse of discretion.

¶ 19 In *Brown*, the defendant filed a *pro se* postconviction petition which included allegations of ineffectiveness of counsel. *Brown*, 336 Ill. App. 3d at 713. In the petition, the defendant acknowledged his petition was filed to meet the filing deadline under the Act and requested leave to file a memorandum in support of his petition. *Id.* The defendant explained that a paralegal

was preparing a memorandum in support of the petition, but had not yet completed the memorandum. *Id.* at 713-14. The defendant subsequently filed an amended postconviction petition with supporting memorandum of law and affidavits. *Id.* at 714-15. The amended petition stated that since the filing of his initial petition, research had led the defendant to conclude certain of the claims in the initial petition were meritless and that there were additional issues which should have been raised. *Id.* at 714. The defendant alleged in the amended petition that he had an alibi and attached his own affidavit and the affidavits of four witnesses attesting that the defendant was at a family Labor Day picnic at the time of the incident. *Id.* at 714-15. The defendant's affidavit further averred that he had informed trial counsel of these alibi witnesses, and his wish to testify. The defendant did not testify at trial and trial counsel did not call the alibi witnesses. *Id.* at 715. The trial court dismissed the postconviction petition as frivolous and patently without merit without considering the amended postconviction petition and the supporting affidavits. *Id.* at 715. On appeal, this court stated:

"Given the rather unique circumstances of this case, we find that petitioner sufficiently preserved his rights under the Act when he filed the original petition with an explanation that he was doing so in order to meet the deadline and that an amended petition, which presumably was going to sufficiently raise the gist of a constitutional claim, would be forthcoming. Whether the court implicitly denied the amended petition or simply refused to address it, as the State argues on appeal, we are unable to determine from the record. Nonetheless, if the court, in fact, implicitly denied petitioner's request to amend or simply refused to address it, such denial or refusal was *an abuse of its discretion*, particularly in light of the fact that the amended petition raised the gist of a constitutional claim." (Emphasis added.) *Id.* at 720-21.

The matter was remanded, and the trial court was instructed to allow the defendant leave to file the amended petition and to docket the matter for second-stage proceedings. *Id.* at 721.

¶ 20 By contrast, in this case, defendant's initial petition did not indicate he would be seeking an amendment, or that the initial petition was, otherwise, inadequate without the amendment. The amended petition presented additional claims, but not additional affidavits in support of any of defendant's claims. Defendant offered no reason for not including the additional claims in his initial petition and did not state the claims were newly discovered. See *Harris*, 224 Ill. 2d at 140 (where supreme court found no abuse of discretion where the dismissal of a postconviction petition implicitly denied the defendant's request for leave to amend the petition when the defendant had not provided an explanation or detail as to his request). The amended petition was mailed two months after the initial petition was mailed—without explanation for the delay, or need for the amendment. In *Brown*, we found an abuse of discretion where the amended petition and supporting affidavits presented the gist of a constitutional claim. We note defendant's amended petition here sets forth claims which could have been presented on direct review and, therefore, are deemed waived. *Smith*, 2013 IL App (4th) 110220, ¶ 19. The "unique circumstances" which existed in *Brown* are not present in this case. *Brown* does not require a finding of abuse of discretion in this case.

¶ 21 The trial court dismissed the initial petition within the required 90 days. Defendant has not argued his initial petition, or amended petition, sufficiently alleged a gist of a constitutional claim to survive dismissal at the first stage. *Brown*, 336 Ill. App. 3d at 716. Defendant has failed to demonstrate that the trial court's order of dismissal, without granting him leave to amend, was an abuse of discretion. We, therefore, affirm the dismissal.

¶ 22 Because we have affirmed the dismissal, we will not vacate the filing fees and court costs assessed against defendant, and deny defendant's request to order the IDOC to reinstate any good-time credit which had been revoked due to the filing of a frivolous postconviction petition.

¶ 23 Affirmed.