2015 IL App (2d) 141130-U
No. 2-14-1130
Order filed September 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 93-CF-2202
LESLIE H. PEACE,	)	Honorable Veronica M. O'Malley,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's amended postconviction petition. Although defendant included a particular claim in his *original* petition, he did not reiterate it in his amended petition, and thus the claim was not before the court.

¶ 2 Defendant, Leslie H. Peace, 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 2014)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 6, 1994, defendant pleaded guilty to first-degree murder (720 ILCS 5/9-1(a)(1) (West 1992)). The trial court sentenced defendant to 100 years in prison. Defendant filed a motion to withdraw his guilty plea or, in the alternative, for reconsideration of his sentence. The trial court denied the motion, and we affirmed the judgment. *People v. Peace*, No. 2-94-0901 (1996) (unpublished order under Supreme Court Rule 23).

¶ 5 On April 24, 2001, defendant filed a *pro se* "Common Law Motion to Vacate Petitioner's Void Judgment in Light of *Apprendi v. New Jersey*." Thereafter, appointed counsel filed an "Amended Petition for Post-Conviction Relief," which reiterated defendant's contentions in his *pro se* motion. The State moved to dismiss the amended petition and, on that same day, defense counsel filed an "Amended Common Law Motion to Vacate Petitioner's Void Judgment." The court granted the State's motion to dismiss. Defendant appealed, and we affirmed the judgment. *People v. Peace*, No. 2-01-1441 (2003) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 6, 2012, defendant filed a "[Motion] for Leave to File Successive Post-Conviction Petition Pursuant to 725 ILCS 5/122-1(f)" (motion for leave to file). Attached thereto was a proposed "Petition For Successive Postconviction [Relief]." In the proposed petition, defendant raised the following claims. First, he argued a claim "of 'Actual Innocence' based upon a new law for 'Involuntary Intoxication' due to Perscription [*sic*] Medication(s) which caused his conduct and was not available as a defense at the time of said crime(s)." With regard to this claim, he also argued that postconviction counsel and appellate counsel were ineffective. Next, he claimed "the violation of a negotiated plea agreement of which was not knowingly and intelligently entered into nor did he receive the benefit of the bargain in that, he was not admonished regarding a three (3) year [mandatory supervised release (MSR)] term thereby violating the 100 year cap agreement." With regard to this claim, he also argued that

trial counsel, postconviction counsel, and appellate counsel were ineffective. Next, he argued that he was denied his right to a fitness hearing. He maintained that, at the time of his plea and sentence, it was likely that he was suffering from side effects from the withdrawal of certain medications. Finally, he argued that his conviction was the result of a " 'Fatally Defective Indictment.' "

¶ 7 On July 27, 2012, the trial court denied defendant leave to file the proposed petition, based on defendant's failure to establish cause and prejudice under the Act.

¶ 8 Defendant timely appealed and argued that the proposed petition was not actually a successive postconviction petition; rather, it was an initial petition under the Act. Therefore, according to defendant, because the trial court ruled on it more than 90 days after it was filed, the court's order must be vacated and the matter remanded for stage-two proceedings under the Act. *People v. Peace*, 2014 IL App (2d) 120926-U, ¶ 10. The State conceded that the proposed petition was an initial petition but argued that first-stage proceedings were appropriate on remand. *Id.* ¶ 11. We accepted the State's concession that the proposed petition was defendant's first postconviction petition, and we agreed that first-stage proceedings were appropriate. *Id.* ¶ 12. Accordingly, we remanded for "the filing and docketing of defendant's proposed petition as an initial postconviction petition under the Act." *Id.* ¶ 15.

¶ 9 On July 30, 2014, shortly after remand, defendant filed a *pro se* "Amended Petition for Postconviction Relief" (the amended petition).[1] In the amended petition, defendant advanced the

[1] Defendant also filed a "Petition to Withdraw Guilty Plea and Vacate Sentence," wherein he stated that the basis for withdrawing his plea was contained in his amended petition. On October 3, 2014, the trial court dismissed defendant's petition to withdraw his guilty plea for lack of jurisdiction. Defendant does not challenge that dismissal on appeal.

following claims. First, he argued that a "viable and legitamate [*sic*] defense" of involuntary intoxication was ignored by trial counsel. Second, he argued that his plea was invalid because at the time of his plea he had not been provided with Xanax, a medicine that had previously been prescribed to him. Third, he argued that trial and appellate counsel were ineffective for failing to investigate and address the issue of whether he had been suffering from side-effects due to the discontinuation of his medication. Finally, he argued that his constitutional rights to due process and equal protection under the law were violated by the "unilateral modification of *** [his] plea agreement to include a term of MSR not previously bargained for" as part of a "100 year sentence cap agreement."

¶ 10 On October 3, 2014, the trial court entered an 18-page order dismissing defendant's amended petition as "patently without merit." First, the trial court found that defendant's claim that he had a viable defense of involuntary intoxication was not supported by the law. The trial court rejected defendant's related argument that counsel was ineffective for failing to raise such a defense. Next, the trial court found that there was no arguable basis in the record for a claim that defendant was unfit at his plea hearing or that a fitness hearing was required. The trial court rejected defendant's related argument that trial and appellate counsel were ineffective for failing to raise the issue or demand a fitness hearing. Finally, the trial court, in a single paragraph, rejected defendant's claim concerning the plea agreement as follows:

> "The Petitioner's next claim may be dealt with briefly. The Petitioner alleges that the trial court failed to admonish him that he would be subject to a three-year [MSR] period after his term of imprisonment. The Petitioner also asserts that he has the right to enforce the terms of his plea agreement for a cap of 100 years, which Petitioner claims would be violated by the addition of the MSR to his 100-year sentence. Though he does not cite

the case directly, it is apparent the Petitioner's claim is based on the holding in *People v. Whitfield*, 217 Ill. 2d 177 (2005). However, our Supreme Court has held that the rule announced in *Whitfield* is only applicable prospectively to cases where the conviction was not finalized prior to December 20, 2005, which was the date of the *Whitfield* decision. See *People v. Morris*, 236 Ill. 2d 345, 366 (2010). Given that the Petitioner's judgment and sentence was finalized long before December 20, 2005, the Petitioner is not entitled to relief under *Whitfield*."

¶ 11 Defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 The Act "provides a procedural mechanism in which a convicted criminal can assert 'that in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.' " *People v. Harris*, 224 Ill. 2d 115, 124 (2007) (quoting 725 ILCS 5/122-1(a) (West 2002)). A trial court may summarily dismiss a postconviction petition if it determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A postconviction petition is considered frivolous or patently without merit only if it has no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). If a petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the court does not dismiss the petition, the petition advances to the third stage, where the court conducts an evidentiary hearing. *Id.* We review *de novo* the trial court's order summarily dismissing a postconviction petition. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 On appeal, defendant argues that the matter should be remanded for stage-two proceedings under the Act because he presented an arguable claim that trial counsel and appellate counsel were ineffective for failing to argue that defendant was denied due process and did not enter a knowing and intelligent plea, where he was not admonished that a three-year term of MSR would be added to his 100-year sentence. Defendant claims that "*Morris* has no application here where [defendant] claims that he was denied his constitutional right to effective assistance of trial counsel and appellate counsel." Because defendant failed to include the ineffectiveness claim in his amended petition, we hold that it has been forfeited.

¶ 15 Defendant's appellate counsel has misrepresented the content of the amended petition. Counsel cites to defendant's *original* petition in asserting that defendant argued that his plea was invalid because he was not admonished that a three-year MSR term would be added to his sentence and that trial counsel and appellate counsel were ineffective for failing to raise this claim on his behalf. Counsel goes on to assert that defendant "reiterated this claim" in his amended petition. However, although defendant reiterated his claim based on *Whitfield*, he did not include the related ineffectiveness claim. An amended postconviction petition supersedes the defendant's original petition such that any claims not included in the amended petition are not properly before the trial court. See *People v. Pinkonsly*, 207 Ill. 2d 555, 566-67 (2003) (citing *People v. Phelps*, 51 Ill. 2d 35, 38 (1972), and *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn.")). Indeed, the trial court made no ruling on a claim of ineffectiveness related to the lack of an MSR admonishment, as no such claim was before the court.

¶ 16 As our supreme court has stated, " '[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act.' Thus, any issues to be reviewed must be presented in the petition filed in the circuit court." (Emphasis added.) *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (quoting *Coleman*, 183 Ill. 2d at 388). In *People v. Cathey*, 2012 IL 111746, ¶ 21, the supreme court held that the appellate court erroneously reached an issue when that issue was not raised in the defendant's postconviction petition. Here, because defendant failed to include in his amended petition the issue concerning trial counsel's and appellate counsel's alleged ineffectiveness as to the three-year MSR term, we will not consider it.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we affirm. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 19 Affirmed.