

No. 1-14-0132

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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 18393
)	
MICKEY MASON,)	Honorable
)	Rosemary Grant Higgins,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the circuit court's summary dismissal of defendant's postconviction petition where the circuit court did not err in denying his motion to reconsider without considering his supplemental petition, or in not recharacterizing his motion for an extension of time to file a supplemental petition as a motion to voluntarily withdraw his initial petition.

¶ 2 Defendant Mickey Mason appeals from the circuit court's summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). On appeal, defendant contends that the circuit court erred in denying his motion to

reconsider the dismissal of his postconviction petition without considering his supplemental petition. Defendant also contends that the circuit court abused its discretion by failing to recharacterize his motion for an extension of time to file a supplemental postconviction petition as a motion to voluntarily withdraw his initial petition. We affirm.

¶ 3 The record sets forth that defendant and his codefendant Renwick Wells, who is not a party to this appeal, were charged, in pertinent part, with the first degree murder of Terry Morris, who was shot and killed with a firearm on December 23, 2003. 720 ILCS 5/9-1(a)(2) (West 2002).

¶ 4 At defendant's 2010 bench trial, Cedric Hayes, who was in the custody of the Department of Corrections (DOC), testified that, on the night in question, he was driving around selling marijuana. The victim, Morris, was in the passenger seat. Defendant was present during an argument Hayes had with Durrell Smith. Following the argument, Hayes drove away and someone shot at his vehicle multiple times. Although Hayes noticed defendant on the street, he did not observe defendant with a handgun and believed that only one person was shooting at the vehicle. Hayes later clarified that he noticed defendant on the street but did not hear the shots until he had driven past defendant. Hayes testified he was unharmed, but when he looked at the victim, he appeared to be dead.

¶ 5 Durrell Smith, Reggie Gardner, and Latasha Danner, who all had criminal records, testified that they did not notice defendant shooting a firearm on the evening in question. They were subsequently impeached by prior inconsistent statements.

¶ 6 In particular, Smith had testified before the grand jury that he was riding in a vehicle with defendant, codefendant, and some other men when they noticed Hayes and another man in a vehicle. Hayes indicated that he had marijuana for sale, and an argument broke out between

Hayes, defendant, and codefendant. Hayes was told to leave the block. Hayes drove away and Smith entered his aunt's house. As Smith was preparing to leave the house, he heard gunshots and observed shots coming from a gangway on the right side of his aunt's house. Codefendant and defendant were firing at Hayes' car and thereafter fled the scene. When Smith later inquired why defendant and codefendant shot at the vehicle, they indicated that Hayes had acted as though he was armed.

¶ 7 Gardner had testified before the grand jury that he observed an argument between a man in a vehicle and a group that included defendant and codefendant. He observed codefendant enter an alley, come back out, and speak to defendant. Gardner then heard shots and observed defendant and codefendant with weapons, firing toward the passenger side of the vehicle containing the men with whom they had argued.

¶ 8 Detective Allen Szudarski testified at trial that he was present when Gardner identified the shooters from photo arrays and also when Gardner's statement was reduced to writing by an Assistant State's Attorney. In the statement, which was admitted into evidence and then published to the jury at trial, Gardner informed him that he observed defendant yelling at someone in the passenger side of a vehicle and then defendant and codefendant pointed handguns at the vehicle and started shooting. The statement also indicated that Gardner had identified defendant in a photo array.

¶ 9 Danner had testified before the grand jury that she was getting high on the night in question and noticed men selling drugs out of a red automobile. A van drove up, and when defendant emerged from the van, he asked her whether the guys in the automobile were selling drugs. Danner answered affirmatively, and defendant responded that they were "gonna be on some bullshit tonight," meaning that "they" were going to be fighting or shooting. Defendant and

codefendant confronted the occupants of the red automobile and told them that they could not sell on the block. The occupants of the vehicle stated that they could sell wherever they wanted. The red automobile initially left the block, but then returned. Defendant and codefendant exited a gangway holding firearms. As she was paying attention only to defendant, Danner observed defendant shooting.

¶ 10 The parties stipulated at trial that Kimberly Miller, an investigator with the Office of the Public Defender, would testify that, during a December 2009 conversation with Danner, Danner indicated that she was under a porch when she heard gunshots, and, as she crawled out, she observed defendant shooting a handgun at the vehicle containing the victim.

¶ 11 Detective John Foster testified at trial that Danner identified a photo of defendant as the person who shot at the vehicle, and indicated that codefendant was present at the scene.

¶ 12 In defendant's case-in-chief, defendant presented the stipulated testimony of Terrance Garrett. In particular, Garrett would have testified that he was smoking drugs with Danner when he heard gunshots and noticed people running. He never noticed defendant with a weapon.

¶ 13 Defendant was convicted of first degree murder and sentenced to 45 years' imprisonment, which included 20 years for personally discharging a firearm during the course of the offense. We affirmed that judgment on direct appeal. *People v. Mason*, 2012 IL App (1st) 110451-U.

¶ 14 On August 6, 2013, defendant filed a *pro se* postconviction petition, alleging that he was denied his right to due process where the trial court did not give proper weight to Hayes' testimony, instead relying on the recanted grand jury testimony of Smith, Gardner, and Danner. Defendant also alleged that trial counsel was ineffective for failing to investigate the crime scene, which defendant claimed would have shown that Smith could not have observed defendant with a gun from his vantage point, and for failing to argue against the 20-year sentence

enhancement for personally discharging a firearm. Defendant further argued that his appellate counsel was ineffective for failing to raise the above claims on direct appeal. He attached to his petition a portion of this court's order affirming his first degree murder conviction on direct appeal, and his own affidavit that reiterated the claim in his petition that Smith could not have witnessed the shooting from his vantage point.

¶ 15 On August 22, 2013, defendant filed a *pro se* motion for an extension of time until November 15, 2013, to file an amended petition, explaining that he needed additional time in the prison law library to prepare the amended petition. On September 30, 2013, the circuit court denied the motion, stating that defendant's request for an extension to November 15 was beyond the 90-day time limit for initial review of the postconviction petition.

¶ 16 The trial court issued a written order dismissing defendant's petition as frivolous and patently without merit. The order reflects a file stamp date of October 25, 2013, as well as a file stamp date of November 4, 2013, which is crossed out in ink. The record does not indicate that any proceedings regarding defendant's petition were conducted on October 25. However, during the proceedings on November 4, 2013, the circuit court stated that the petition was frivolous and patently without merit, and that its order would be *nunc pro tunc* to September 30, 2013. In dismissing the petition, the circuit court stated in its written order that defendant's reasonable doubt argument regarding the strength of the State's witnesses was improperly raised in his postconviction petition as it was not of constitutional magnitude, and was barred by *res judicata* as the matter had been decided on direct appeal. The court also rejected defendant's ineffective assistance of counsel claims as he was unable to demonstrate that counsel's representation arguably prejudiced him.

¶ 17 Defendant mailed a *pro se* "supplemental petition" that was file-stamped by the circuit

court on November 5, 2013. The affidavit of service indicated that the supplemental petition was mailed on October 21, 2013. In the supplemental petition, defendant argued that his due process rights were violated by the false testimony provided by the State's witnesses to the grand jury, and that his trial counsel was ineffective for not requesting that the trial court "dismiss the indictment" based upon that false testimony.

¶ 18 Defendant also claimed that Darius Butler would have testified that defendant was not the shooter. Defendant specifically stated that, although Butler's statements do "not mean [defendant] is innocent, *** the facts and surrounding circumstances *** should be scrutinized more closely to determine the guilt or innocence of [defendant]." In defendant's own affidavit, he asserted that Butler's "affidavit" provided newly discovered evidence because he received the document from Butler on October 5, 2013, and had no prior knowledge that Butler witnessed the shooting.

¶ 19 In Butler's attached "affidavit," which was neither signed nor notarized, he indicated that he saw defendant on the sidewalk on the date in question talking to someone in a red car. During the conversation, another person wearing a mask started shooting at the red car while defendant dropped to the ground. After the shooting, Butler saw defendant run away. He did not know defendant was charged or convicted of the murder and never said anything earlier because he was scared. Butler averred that he would testify to what he had witnessed.

¶ 20 Defendant also mailed a *pro se* "motion to reconsider" that the circuit court received on November 22, 2013. In it, defendant argued, in pertinent part, that because the supplemental petition had been mailed on October 21, 2013, it was "filed" prior to the summary dismissal of his original petition and before the expiration of the 90-day period for such a summary dismissal. Defendant maintained that, because the circuit court did not consider any of the claims in the

supplemental petition when it entered the summary dismissal, the order constituted an improper partial summary dismissal and should be vacated so that the court could "consider [his] supplemental [petition] with the newly discovered evidence of Darius Butler."

¶ 21 At a hearing on December 11, 2013, the circuit court denied the motion, stating that:

"The defendant has filed something he refers to as Motion to Reconsider Procedural Posture and he's asking for an extension of time to file postconviction relief and that is denied. He does not list any extenuating circumstances that would justify that. I believe it would have expired November 4th. So he did not file a timely request and he did not support it with sufficient basis to show his due diligence and his reason for failing to file an extension before the expiration of the time."

This appeal followed.

¶ 22 On appeal, defendant first contends that the circuit court erred in not granting his motion to reconsider the dismissal of his postconviction petition in order to review the merits of his supplemental petition. Defendant makes no argument that the claims in his original postconviction petition were sufficient to survive summary dismissal. Defendant also states he is not arguing that the court erred in refusing his motion for extension of time or that the court should have waited to rule on his petition until the supplemental petition was filed. Instead, defendant argues that, as the court had received his supplemental petition before the time he filed his motion to reconsider, it should have granted the motion to reconsider and evaluated the supplemental petition on its merits. As relief, defendant requests that we reverse the denial of his motion to reconsider and remand the matter to the circuit court to review the claims in his supplemental petition at the first stage of postconviction proceedings.

¶ 23 The Act allows a defendant to collaterally attack his conviction if it resulted from a

substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). During the first stage of proceedings, the circuit court has 90 days from the date of filing and docketing to determine whether, taking the petition's allegations as true, it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Hodges*, 234 Ill. 2d at 10. If the circuit court determines that the petition is frivolous and patently without merit, it may summarily dismiss the petition. *Hodges*, 234 Ill. 2d at 10-11.

¶ 24 When a postconviction petition is summarily dismissed at the first stage, a defendant may move to reconsider the dismissal within 30 days of the entry of that summary dismissal. *People v. Dominguez*, 366 Ill. App. 3d 468, 472 (2006). Such a motion is akin to a motion to reconsider a final judgment in a civil proceeding. *Id.* "[O]ne of the purposes of a motion for reconsideration is to bring to the court's attention newly discovered evidence. If the motion for reconsideration presents new evidence, it lies within the trial court's discretion whether to consider the new evidence." (Internal citations omitted). *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 62. However, "regardless of whether the motion to reconsider presents new facts, [appellate courts] review *de novo* the trial court's application of laws to the facts." *In re County Collector of Lake County*, 343 Ill. App. 3d 363, 371 (2003); see also *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008) (describing the dual standards of review applicable to appeal from a motion to reconsider).

¶ 25 The parties dispute what type of new evidence may be appropriately set forth in a motion to reconsider the denial of a postconviction petition. The State maintains that the motion to reconsider is limited to new evidence related to a preexisting claim raised in the original petition. Defendant, however, argues that motions to reconsider are intended for the presentation of new evidence and *new issues*. We agree with the State, and find that the Fourth District's decision in

People v. Coleman, 2012 IL App (4th) 110463, supports the State's contention that any new evidence presented in a motion to reconsider the summary dismissal of a postconviction petition must be related to a preexisting claim in the original petition.

¶ 26 In *Coleman*, the defendant, through counsel, filed a postconviction petition, alleging, in part, that trial counsel was ineffective for entering into a stipulation regarding forensic testing of the evidence, as that evidence (cocaine) was improperly tested. *Coleman*, 2012 IL App (4th) 110463, ¶¶ 26-27. The circuit court summarily dismissed his petition as frivolous and patently without merit. *Id.* ¶ 28. Defendant filed a *pro se* motion to reconsider the circuit court's summary dismissal, supported by an affidavit from a private investigator who attested that the forensic scientist who tested the cocaine told her he did not perform a purity test on the evidence. *Id.* ¶¶ 38, 41. Defendant argued that he was therefore indicted for a felony in which the actual amount of controlled substance was not proven. *Id.* ¶ 40. The trial court ultimately denied the motion to reconsider. *Id.* ¶ 42.

¶ 27 On appeal, the Fourth District addressed the question of which materials in the record it should consider in evaluating the defendant's claim. *Id.* ¶ 58. It held that the circuit court considered the affidavit in denying the motion to reconsider, and that it would do the same on appeal where the "affidavit was not a new claim; rather, it was additional evidence in support of the preexisting claim." *Id.* ¶¶ 61-63; see also *People v. Henderson*, 2014 IL App (2d) 121219, ¶ 21 (considering affidavits attached to a motion to reconsider where they supported a preexisting claim). Therefore, as defendant argues, *Coleman* provides that circuit courts have the discretion to consider new evidence at the motion to reconsider stage. However, contrary to defendant's argument, *Coleman* makes clear that the new evidence must support a preexisting claim in the petition and *new issues* should not be considered.

¶ 28 Here, defendant's "supplemental petition" underlying his motion to reconsider presented new issues rather than new evidence in support of the preexisting claims in his original petition. In his postconviction petition, defendant argued that he was denied his right to due process where the trial court did not give proper weight to Hayes' testimony that he did not notice defendant shoot or holding a gun, and that his trial and appellate counsel were ineffective for failing to investigate the crime scene and for failing to argue against the 20-year sentence enhancement for personally discharging a firearm. His supplemental petition, however, presents no new evidence regarding these claims.

¶ 29 Instead, the supplemental petition raises a claim of innocence based on Butler's affidavit, which asserted that a masked man, not defendant, was the shooter. It also raises claims regarding false testimony from the State's witnesses, and ineffective assistance of trial counsel for failing to move to dismiss the indictment. These new claims were brought to the circuit court's attention for the first time in defendant's motion to reconsider. Defendant was never granted leave to amend his original petition, and "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012).

Therefore, the circuit court properly refused to consider the supplemental petition supporting the motion to reconsider, and we see no basis in the record to upset that determination or consider the waived arguments in the supplemental petition. See *People v. Reed*, 2014 IL App (1st) 122610, ¶ 43 ("This court lacks the authority to excuse an appellate forfeiture caused by the failure of a litigant to include issues in his or her postconviction petition.").

¶ 30 The above conclusion is supported by the fact that Butler's affidavit was unsigned and unnotarized. A postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS

5/122-2 (West 2012). Further, an affidavit may be attached to a motion to reconsider the dismissal of a postconviction petition. *Henderson*, 2014 IL App (2d) 121219, ¶ 21; *Coleman*, 2012 IL App (4th) 110463, ¶¶ 61-62. Here, defendant attached an affidavit which appears to be from Darius Butler. However, the alleged affidavit is not signed or notarized. Although the supreme court in *People v. Allen*, 2015 IL 113135, ¶¶ 31, 34, held that lack of notarization cannot be a basis for dismissing a petition at the first stage, the statement in that case was signed and contained a thumbprint for verification. The court, therefore, found it qualified as "other evidence" under the Act and sufficient to support the petition on first stage review. *Id.* ¶¶ 43, 48. Here, however, the "affidavit" lacks any type of verification and was not signed. It is, therefore, insufficient to qualify as "other evidence" under the Act. Accordingly, Butler's statement cannot provide the necessary support for defendant's innocence claim.

¶ 31 We note that "[s]ection 122-3 of the Act does not forbid the filing of a successive petition." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). The Act allows a successive petition when a defendant can show either cause and prejudice (objective cause for, and prejudice from, not raising an earlier claim) or state a claim of actual innocence. *People v. Coleman*, 2013 IL 113307, ¶¶ 82-83. Therefore, the proper vehicle for defendant's claims is a successive postconviction petition.

¶ 32 Defendant next maintains that the circuit court abused its discretion in not recharacterizing his motion for an extension of time in which to file an amended postconviction petition as a motion to voluntarily withdraw his initial petition, giving him the opportunity to refile an amended petition within one year.

¶ 33 Citing to *People v. Shellstrom*, 216 Ill. 2d 45, 51-52, 57 (2005), defendant asserts that Illinois courts are liberally permitted to recharacterize *pro se* pleadings under the Act, provided

that the court notifies the litigant of its intent to recharacterize, explains the consequences of such recharacterization, and provides the litigant an opportunity to withdraw or amend the pleading. Defendant maintains that, had the circuit court recharacterized his motion as one for voluntary withdrawal, it would have permitted him to ensure that all of his claims were evaluated in his first postconviction filing. According to defendant, this recharacterization of his motion would have been the most equitable outcome, particularly where the court knew he was preparing a supplemental petition, which he subsequently filed one day after his initial petition was dismissed.

¶ 34 Defendant's *pro se* motion for an extension of time to file an amended petition only stated that he needed more time in the law library and asked for an extension that would have been beyond the 90-day period the circuit court had to rule on the petition at the first stage of proceedings. In making the request, defendant did not mention Butler's affidavit, did not explain what issues the "amended" petition would include, and did not state why the additional claims had not been addressed in his original petition. Therefore, we find defendant's assertion in his brief that the circuit court knew he was preparing a "supplemental" petition is speculative at best.

¶ 35 More importantly, defendant does not cite a single case holding that a motion for an extension of time to file an amended postconviction petition qualifies as a pleading that a court should recharacterize as an entirely different motion. Furthermore, defendant does not cite any authority holding that a court abuses its discretion when it denies a request for an extension of time rather than recharacterize it as a motion to vacate an earlier pleading.

¶ 36 Further, as our supreme court in *People v. Stoffel*, 239 Ill. 2d 314 (2010), makes clear, although a trial court "may" recharacterize a *pro se* pleading, it has no obligation to do so, and "[i]t cannot be error for a trial court to fail to do something it is not required to do." *Id.* at 324

(citing *Shellstrom*, 216 Ill. 2d at 53 n. 1). Accordingly, a trial court's decision not to recharacterize a defendant's *pro se* pleading is not error. *Stoffel*, 239 Ill. 2d at 324.

¶ 37 Under *Stoffel*, the circuit court here was not obligated to recharacterize a motion that requests one thing (an extension of time) as a motion requesting something entirely different (motion to withdraw initial petition). Therefore, we may not consider whether the trial court erred in failing to recharacterize the motion for an extension of time as a motion to withdraw the original petition. *Id.* at 324. Absent a basis to reverse the circuit court's judgment on this issue, we affirm its denial of defendant's motion for an extension of time.

¶ 38 In reaching this decision, we find unpersuasive defendant's argument that *Stoffel* is distinguishable from the case at bar. We acknowledge that the Illinois Supreme Court in *Stoffel* considered whether a trial court abused its discretion in refusing to recharacterize a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)), as a postconviction petition. *Id.* at 316, 322. Here, defendant argues that the circuit court abused its discretion in refusing to recharacterize his *pro se* pleading for procedural relief (motion for extension of time) as a motion to voluntarily withdraw his original petition. We find this to be a difference without distinction. In either case, the circuit court was under no obligation to recharacterize the pleadings, and we thus find *Stoffel* applicable here.

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 40 Affirmed.