

No. 1-16-0221

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
Respondent-Appellee,)	Cook County
)	
v.)	No. 04 CR 19004
)	
DWAYNE MCCOY,)	
)	Honorable
Petitioner-Appellant.)	Charles P. Burns,
)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County is reversed and remanded for further second-stage proceedings where the circuit court failed to address petitioner’s supplemental postconviction petition filed by appointed counsel.

¶ 2 Petitioner Dwayne McCoy appeals the second-stage dismissal of his “supplemental petition” for relief (supplemental petition) after remand under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, petitioner argues the circuit court

erred in dismissing his supplemental petition without evaluating the merits of his claim because he made a substantial showing that he was deprived of his right to a fair trial where the State knowingly presented perjured testimony. For the following reasons, we reverse the circuit court's order and remand the cause for second-stage proceedings consistent with this order.

¶ 3

BACKGROUND

¶ 4 This matter appears before us on appeal for the second time after a first-stage dismissal in the trial court and remand for second-stage proceedings. As it is unnecessary for this court to examine petitioner's substantive claim, the underlying facts of this case will only be detailed as is necessary for the resolution of the relevant issues. After a bench trial, petitioner was found guilty of first degree murder and sentenced to 65 years in the Illinois Department of Corrections. At trial, the State established, through the eyewitness testimony of Anthony Phillips (Phillips) and Thurman Wade (Wade), that petitioner fatally shot the victim. In his defense, petitioner presented the testimony of Cornell Owens (Owens), who testified that petitioner was merely present when an unidentified man ran out of an alley and shot the victim. In rebuttal, however, the State presented Kaya Washington (Washington) who testified that while looking out of her bedroom window, she observed "a body" fall out of a vehicle and that no one was on the street. She then heard gunshots a few seconds later. In finding the petitioner guilty of murder, the trial court determined that Phillips and Wade testified in a credible manner and, based in part on Washington's testimony, Owens was not a credible witness. Petitioner was sentenced to 65 years in the Illinois Department of Corrections. On appeal, this court affirmed petitioner's conviction and sentence.

¶ 5 On August 3, 2009, petitioner filed an initial *pro se* postconviction petition arguing, in pertinent part, that trial counsel was ineffective for failing to impeach Washington with prior

statements she provided to the police. The circuit court dismissed the petition, finding it to be frivolous and without merit. On the prior appeal, petitioner only asserted that he had raised an arguable claim of ineffective assistance of counsel for failing to impeach Washington, thus waiving his remaining claims. This court agreed, stating, “We reverse and remand this case for second-stage proceedings without expressing an opinion as to whether petitioner will ultimately prevail on his ineffective assistance claim.” *People v. McCoy*, No. 1-09-3407 (2011) (unpublished order under Illinois Supreme Court Rule 23) (*McCoy I*).

¶ 6 Upon remand, counsel was appointed to represent petitioner and was granted leave to file the supplemental petition. In addition to the ineffective assistance of counsel claim asserted in the initial petition, postconviction counsel also presented a supplemental postconviction petition alleging that Washington perjured herself and that she did so because she was threatened by the police, thus depriving petitioner of his due process right to a fair trial. Petitioner supported his argument with two documents from Washington: (1) a notarized letter; and (2) an affidavit. Both documents indicated that at trial she testified to what police officers instructed her to say because they threatened her with jail if she did not comply. In addition, Washington stated in the letter that on the evening in question she awoke to the sound of gunshots, but did not go to the window because gunshots were quite common in the area and she knew going to the window could be dangerous. In her affidavit Washington stated that she was awoken by gunfire and only observed a vehicle leaving the scene.

¶ 7 The State filed a motion to dismiss in which it argued petitioner had waived his ineffective assistance of counsel claim and his supplemental petition did not set forth a cognizable perjury claim. After hearing arguments on both the *pro se* and supplemental petitions, the circuit court granted the State’s motion to dismiss, but solely on the ineffective assistance of

counsel claim. The circuit court found it lacked jurisdiction to consider the supplemental petition as it exceeded the scope of the appellate court's mandate. Consequently, the circuit court declined to address the arguments presented in the supplemental petition. This appeal follows.

¶ 8

ANALYSIS

¶ 9 On appeal, petitioner maintains remand for third-stage proceedings is necessary where the circuit court did not rule on his supplemental petition. Petitioner contends he made a substantial showing of a constitutional violation at trial, namely that he was denied his due process right to a fair trial when the State knowingly presented the perjured testimony of Washington. The State agrees that the circuit court erred in not considering and ruling on the supplemental petition, but asserts the dismissal order should be affirmed under *de novo* review. For the reasons that follow, we agree that the supplemental petition should have been addressed, but decline to review the supplemental petition *de novo* and thus remand the matter for further second-stage proceedings.

¶ 10 The Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous and patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition survives initial review, however, the process moves to the second stage, where the circuit court appoints counsel for the defendant when the defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2014). After an

appointment, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments that are necessary to the petition previously filed by the *pro se* defendant. *People v. Wheeler*, 392 Ill. App. 3d 303, 307 (2009). The State may then file a motion to dismiss or an answer to the postconviction petition. 725 ILCS 5/122-5 (West 2014).

¶ 11 If the State moves to dismiss the petition, the circuit court may hold a dismissal hearing, which is still part of the second stage. *Wheeler*, 392 Ill. App. 3d at 308. The circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The circuit court, however, is foreclosed from engaging in any fact-finding because all well-pleaded facts are to be taken as true at this point in the proceedings. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). If a substantial showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. We review this issue *de novo*. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); *Coleman*, 183 Ill. 2d at 388-89. Under a *de novo* analysis, we perform the same analysis that the trial court would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 12 In this case, the parties frame the primary issue on appeal to be whether petitioner made a substantial showing that his due process right to a fair trial was violated. Review of this issue, however, is premature as the circuit court merely found it lacked jurisdiction to consider this issue and declined to render a determination on the alleged constitutional violation.

¶ 13 The Act, Illinois Supreme Court Rule 651(c) (eff. Feb 6, 2013), and our case law interpreting those provisions make clear that petitioner had a right to have his perjury claim

heard and decided at a second-stage proceeding by the circuit court. *Wheeler*, 392 Ill. App. 3d at 307. It is well established that once a case is advanced for second-stage proceedings, newly appointed counsel may review petitioner's postconviction petition and assert additional claims. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *Wheeler*, 392 Ill. App. 3d at 307. This procedure is the same whether a claim is remanded for second-stage proceedings or advances directly from the first stage. *People v. Minniefield*, 2014 IL App (1st) 130535, ¶¶ 4, 45-49 (discussing circuit court's second-stage ruling of counsel's supplemental petition following remand from first-stage dismissal and appeal). The circuit court routinely hears cases on remand for second-stage proceedings, and addresses the additional claims asserted by counsel appointed at the second stage. *Id.*

¶ 14 The circuit court here ruled as it did because it was under the belief that it lacked jurisdiction to consider any other claims on remand. A trial court acts outside the scope of authority conferred by the appellate court when the appellate court gives specific directions. See *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001). If specific directions are not given, the trial court must determine from the opinion what further proceedings are proper and consistent with the opinion. *People v. Bosley*, 233 Ill. App. 3d 132, 137 (1992). For example, in *Bosley*, the appellate court reversed the defendant's sentence and remanded the matter for further proceedings consistent with the opinion. *Id.* at 138. The defendant's convictions were left intact. *Id.* Thus, the circuit court's subsequent order vacating defendant's conviction was void for lack of jurisdiction. *Id.*

¶ 15 In the case at bar, petitioner's *pro se* postconviction petition was dismissed at the first stage. This court subsequently reversed and remanded for second-stage proceedings. *McCoy I*, No. 1-09-3407. At the second stage, the circuit court appointed counsel for petitioner and granted

counsel leave to file a supplemental petition. In his supplemental petition, counsel asserted petitioner's due process right to a fair trial was violated when the State knowingly presented the perjured testimony of Washington. The circuit court, however, failed to address petitioner's perjury claim, citing this court's order in *McCoy I*, and stating that the court lacked jurisdiction. The circuit court believed the supplemental petition exceeded the scope of its authority under the appellate court mandate. The circuit court further stated that it must obey unambiguous directions on remand, and pursuant to the direction of the appellate court, its "premier action on remand" was to perform a second-stage evaluation of the ineffective assistance of counsel claim and not the perjury claim.

¶ 16 Unlike the order in *Bosley*, our order in *McCoy I* is devoid of any limiting instructions. *McCoy I*, No. 1-09-3407; see *Bosley*, 233 Ill. App. 3d at 138. Here, we simply remanded the matter for second-stage proceedings. *McCoy I*, No. 1-09-3407. Hearing petitioner's supplemental petition is certainly consistent with such an order as second-stage proceedings require that the appointed counsel review the petitioner's claims and file an amended, or in this case, supplemental petition as necessary. 725 ILCS 5/122-1 *et seq.* (West 2014); Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *Bosley*, 233 Ill. App. 3d at 137-38. We further note that the circuit court actually granted postconviction counsel leave to file the supplemental petition before declining to address its claim. While our *McCoy I* order notes that we did not express an opinion as to whether petitioner will ultimately prevail on his ineffective assistance of counsel claim, that reference does not preclude following the second-stage procedures required by the Act and Rule 651(c). 725 ILCS 5/122-5 (West 2014); Ill. S. Ct. R. 651(c) (eff. Feb 6, 2013). Thus, the circuit court had jurisdiction to address the supplemental petition. *McCoy I*, No. 1-09-3407.

¶ 17 The parties, however, maintain this court can review the supplemental petition *de novo*

because, as a general rule, the sufficiency of the allegations contained in a postconviction petition is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 388. The State further cites *People v. Johnson* for the proposition that the decision of a lower court can be affirmed on any grounds regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct. 208 Ill. 2d 118, 129 (2003). Petitioner relies on an unrelated *People v. Johnson* case for the general proposition that legal determinations are reviewed *de novo*. 205 Ill. 2d 381, 389 (2002). We note that neither the State nor petitioner cite a case wherein the appellate court reviewed an issue *de novo* that was not addressed by the circuit court.

¶ 18 We disagree with the application of the general rule here. Implicit in the rule set forth in *Coleman* and the *Johnson* cases is that the circuit court actually rendered a ruling on the petition. See *Coleman*, 183 Ill. 2d at 378, 380, 382. Here, the circuit court declined to consider the supplemental petition on its merits and dismissed solely for lack of jurisdiction. As explained previously, the circuit court did in fact retain jurisdiction over the supplemental petition. Accordingly, we remand the matter for second-stage proceedings.

¶ 19 Petitioner also asserts that it is judicially economical to remand this matter for a third-stage hearing because, if the circuit court were to dismiss petitioner's perjury claim at the second stage, petitioner would again appeal the decision. Petitioner, however, fails to consider that the circuit court may not dismiss his perjury claim, and instead may advance petitioner's claim to the third stage. Petitioner further contends that remanding the claim for an evidentiary hearing is the appropriate remedy because the record, including petitioner's *pro se* petition, counsel's supplemental petition, Washington's affidavits, and the trial testimony that Washington now claims was false, is sufficient for this court's review on the pleadings and remanding for further second-stage proceedings would not develop the record any further. The main purpose of

second-stage proceedings, however, is not to develop the record, but rather to determine whether petitioner made a substantial showing of a constitutional violation. See *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33. Accordingly, petitioner's arguments fail to persuade us that we should remand the matter for third-stage proceedings.

¶ 20 We further conclude that this remand is limited to the claims raised in the supplemental petition. As the circuit court has already ruled on petitioner's ineffective assistance of counsel claim at a second-stage proceeding, and petitioner did not raise that claim on appeal, he has forfeited such a claim at his second-stage proceeding on remand. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001). Petitioner likewise forfeited all other claims not raised in his petition, supplemental petition, or appeal. 725 ILCS 5/122-3 (West 2014); *People v. Reed*, 2014 IL App (1st) 122610, ¶ 63 (holding claims not clearly set forth in a postconviction petition are forfeited on appeal).

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we reverse the December 10, 2015, order dismissing petitioner's supplemental postconviction petition and remand for further second-stage proceedings consistent with this order.

¶ 23 Reversed and remanded with directions.