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2012 IL App (3d) 110269-U

Order filed November 9, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 12th Judicial Circuit,
Plaintiff-Appellee,	) Will County, Illinois,
	)
v.	) Appeal No. 3-11-0269
	) Circuit No. 09-CF-392
TOBY GODFREY,	)
	) Honorable
Defendant-Appellant.	) Amy Bertani-Tomczak,
	) Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and Holdridge concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Although defense counsel should have filed a written motion to withdraw, defendant was not denied his right to counsel during postplea proceedings.
- ¶ 2 Defendant, Toby Godfrey, pled guilty to one count of residential burglary (720 ILCS 5/19-3 (West 2008)), and three other offenses charged in pending Will County cases. In exchange for his plea, defendant received a sentence of 13 years' imprisonment. On appeal, defendant argues that he was deprived of his right to counsel during postplea proceedings. We

affirm.

¶ 3

### FACTS

¶ 4 Defendant was charged by indictment with residential burglary and financial identity theft. On March 12, 2010, defendant appeared in court, before Judge Amy Bertani-Tomczak, with privately retained counsel, Eric Mitchell. Defendant entered into a fully negotiated plea agreement. In exchange for defendant's agreement to plead guilty to residential burglary and three unrelated charges, the State dismissed the charge of financial identity theft, and the court sentenced defendant to three concurrent terms of 13 years' imprisonment.

¶ 5 On March 19, 2010, defendant filed a *pro se* motion to reconsider sentence. On March 24, 2010, defendant appeared with private counsel and withdrew his motion.

¶ 6 On March 31, 2010, defendant filed a *pro se* motion to withdraw his guilty plea. On June 16, 2010, Rolanda Mitchell appeared in place of her brother, Eric, and made a motion to withdraw her firm's representation. The trial court granted the motion and appointed the public defender.

¶ 7 On October 1, 2010, defendant appeared with appointed counsel, Jason Strzelecki. The case was continued several times until February 9, 2011. On that date, appointed counsel requested a continuance. Counsel stated that "after much communication with [defendant] and much review of the materials \*\*\* I have not been able to file the motion. Nonetheless, defendant would like an opportunity \*\*\* to hire private counsel to review the matter." The court granted the continuance to allow defendant to decide if he wanted to hire private counsel.

¶ 8 On March 8, 2011, appointed counsel and defendant appeared before Judge Bertani-Tomczak. Strzelecki made an oral motion to withdraw, stating "after reviewing all the police

reports, talking with other lawyers in my office, reviewing the transcript of the plea, I have come to the conclusion that we have no issues that we can legitimately pursue by way of a motion to withdraw a guilty plea in this matter." The court inquired if defendant objected to Strzelecki's motion, and defendant responded "yes, if he can get out, if he don't want to be in the case \*\*\* he can step out and I can proceed *pro se*." The court allowed appointed counsel to withdraw.

¶ 9 On March 10 and March 22, 2011, defendant filed amended motions to withdraw his guilty plea. Defendant represented himself on the remaining postplea proceedings, including hearings on ineffective assistance of counsel and his motion to withdraw his guilty plea. The court found that counsel was effective and denied defendant's motion to withdraw his guilty plea. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that he was deprived of his right to counsel when the trial court allowed Strzelecki to withdraw on his oral representation that he could not present a nonfrivolous argument to withdraw defendant's guilty plea. Defendant requests that we adopt a procedure that prevents appointed counsel from either abandoning their client or violating their ethical obligations.

¶ 12 We review this issue *de novo*, as it presents a question of law and necessitates that we determine if defendant's constitutional right to counsel has been violated. *People v. Lofton*, 379 Ill. App. 3d 331 (2007); see also *People v. Span*, 2011 IL App (1st) 083037.

¶ 13 To preserve a plea agreement or sentencing issue for appellate review, a defendant must file a motion in the trial court to: (1) withdraw the guilty plea and vacate the judgment, if challenging his plea; or (2) reconsider sentence, if challenging only his sentence. Ill. S. Ct. R.

604(d) (eff. July 1, 2006). A defendant has the right to the assistance of counsel in the preparation and presentation of his postplea motion. Ill. S. Ct. R. 604(d) (eff. July 1, 2006); *Lofton*, 379 Ill. App. 3d 331. A trial court is obligated to appoint counsel in postplea proceedings, even without a specific request from an indigent defendant, unless it finds that defendant knowingly waived the right to appointed counsel. *People v. Barnes*, 291 Ill. App. 3d 545 (1997).

¶ 14 Here, defendant was represented by private counsel and appointed counsel during part of his postplea proceedings. Appointed counsel withdrew after he had reviewed the record, spoke with defendant, and determined that he could not present a nonfrivolous argument. Requiring appointed counsel to continue to represent defendant at that juncture would have necessitated that he violate Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) and Rule of Professional Conduct 3.1 (Ill. Rs. Prof'l Conduct 3.1 (eff. Jan. 1, 2010)). Rule 137 requires that counsel certify that his court filing is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. Similarly, Rule of Professional Conduct 3.1 directs that a lawyer "shall not bring or defend a proceeding, \*\*\* unless there is a basis in law and fact for doing so that is not frivolous[.]" Ill. Rs. Prof'l Conduct R. 3.1 (eff. Jan. 1, 2010).

¶ 15 We decline to establish a set procedure to prevent counsel from withdrawing when his client wishes to present frivolous arguments in a postplea motion. However, we note that counsel's motion to withdraw should be made in writing. Here, the trial court's ruling was not prejudiced by the absence of a written motion because Judge Bertani-Tomczak presided over defendant's plea hearing, sentencing hearing, and postplea motions, and she ruled on Strzelecki's

motion to withdraw. If the court felt, based on its recollection of the plea and sentencing hearings, that Strzelecki could present a nonfrivolous issue, it could have denied the motion. However, this scenario is not present in every case, and filing a written motion ensures a fully informed decision.

¶ 16 Finally, we find that defendant was not denied the assistance of counsel in preparation of his postplea motions. Defendant was represented by private counsel and appointed counsel at the start of postplea proceedings. Appointed counsel stated that he made an appropriate review of the case. When appointed counsel made his motion to withdraw, defendant volunteered to proceed *pro se*. Consequently, we conclude that defendant was not deprived of his right to counsel.

¶ 17

#### CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.