

NOTICE

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FILED

December 22, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 150758-U

NO. 4-15-0758

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DORIAN D. WILLS,)	No. 12CF136
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting the State's motion to dismiss defendant's postconviction petition at the second stage without providing him notice and an opportunity to be heard on that motion.

¶ 2 Defendant, Dorian D. Wills, appeals the trial court's second-stage dismissal of his postconviction petition. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In October 2012, defendant entered into a partially negotiated plea to aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2010)), a Class X felony (720 ILCS 5/10-2(b) (West 2010)). In exchange, the State agreed to dismiss a robbery count and recommend a sentencing cap of 20 years' imprisonment. Thereafter, the trial court accepted defendant's plea and imposed a 20-year prison sentence.

¶ 5 In July 2013, defendant filed a *pro se* postconviction petition, alleging his trial counsel was ineffective where he had failed to file a motion to reduce the sentence and/or a notice of appeal despite defendant's specific request to do so following the trial court's admonishments about his appeal rights on the day of sentencing. According to defendant's petition and accompanying affidavit, his trial counsel replied to him by saying "it would be a waste of time and money to [file a] motion for reduction of sentence and appeal." Defendant alleged he was prejudiced by being deprived of his right to appeal.

¶ 6 In August 2013, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the court stated the following:

"The defendant's [ineffective-assistance-of-counsel] claim centers around his negotiated plea of guilty to the charge of [a]ggravated [k]idnaping. The defendant was properly admonished that before he could appeal the decision of the Court he must first file a motion to withdraw his guilty plea. Instead, the defendant requested his attorney to file a motion for reduction of sentence. Such a motion, had it been filed, would not have been considered by the Court."

¶ 7 On appeal, we reversed and remanded the matter for second-stage proceedings. See *People v. Wills*, 2015 IL App (4th) 130730-U, ¶ 42. Thereafter, defendant's appointed counsel amended the petition.

¶ 8 On July 28, 2015, defendant filed his amended postconviction petition. In it, defendant argued his trial counsel had provided ineffective assistance by disregarding his request to file a postplea motion despite defendant's request to do so. Defendant maintains he suffered

prejudice because such a motion would have been granted (or an appeal taken if denied) where (1) the trial court failed to provide adequate postplea admonishments as required under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), and (2) his trial counsel essentially conceded during sentencing the maximum 20-year sentence under the sentencing cap was appropriate.

¶ 9 On September 10, 2015, the State filed a motion to dismiss defendant's postconviction petition based on its failure to allege any prejudice.

¶ 10 On September 11, 2015, the trial court granted the State's motion. The court's written order stated, *in toto*, the following:

"The Defendant filed an Amended Post-Conviction Petition on July 28, 2015. The State filed their Motion to Dismiss the Defendant's Petition on September 10, 2015. The State's Motion is well taken. The Defendant's Petition is dismissed."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues the trial court erred in dismissing his amended postconviction petition where he (1) did not have notice or an opportunity to respond to the State's motion to dismiss and (2) made a substantial showing his trial counsel provided ineffective assistance by disregarding his request to file a postplea motion.

¶ 14 A. Post-Conviction Hearing Act

¶ 15 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a mechanism by which a defendant may raise a claim his conviction was the result of a substantial violation of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). The Act

establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 (West 2012). At the first stage, the trial court may dismiss a petition only if it is frivolous or patently without merit. *People v. Harris*, 224 Ill. 2d 115, 125-26, 862 N.E.2d 960, 967 (2007). If the petition survives dismissal at this initial stage, it advances to the second stage, where counsel may be appointed to an indigent defendant and the State may move to dismiss the petition. *Harris*, 224 Ill. 2d at 126, 862 N.E.2d at 967. The defendant must then make a substantial showing of a constitutional violation in order to proceed to an evidentiary hearing, *i.e.*, the final stage of postconviction proceedings. *Harris*, 224 Ill. 2d at 126, 862 N.E.2d at 967. Thus, a second-stage dismissal presents a legal question, which we review *de novo*. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 44, 30 N.E.3d 307.

¶ 16 B. Defendant's Due-Process Claim

¶ 17 Defendant argues his due-process rights were violated where the trial court granted the State's motion to dismiss his amended postconviction petition before he had notice or an opportunity to be heard on that motion. We agree.

¶ 18 "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." ' ' *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "[T]he protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance." *People v. Kitchen*, 189 Ill. 2d 424, 435, 727 N.E.2d 189, 194 (1999). In fact, our supreme court in *Kitchen* went so far as to admonish both bench and bar as follows:

"[W]e today, as in [*People v. Bounds*, 182 Ill. 2d 1, 694 N.E.2d 560

(1998)], mean to send a clear message to both bench and bar that the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance. We trust that such violations will not soon be repeated in our courtrooms." *Kitchen*, 189 Ill. 2d at 435, 727 N.E.2d at 194-95.

"We review *de novo* whether [a] defendant was denied due process." *People v. Miklos*, 393 Ill. App. 3d 205, 209, 914 N.E.2d 506, 510 (2009).

¶ 19 Under section 2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2012)), a trial court has the authority to summarily dismiss a postconviction petition at the first stage of postconviction proceedings without violating a defendant's due-process rights. *Al Momani*, 2016 IL App (4th) 150192, ¶ 11, 55 N.E.3d 725 (citing *People v. Porter*, 122 Ill. 2d 64, 74, 521 N.E.2d 1158, 1161 (1988)). However, "[o]nce postconviction proceedings reach the second stage, the Act does not provide for a trial court to rule on a motion to dismiss *ex parte* without giving a defendant notice and an opportunity to be heard." *Al Momani*, 2016 IL App (4th) 150192, ¶ 12, 55 N.E.3d 725. Instead, "the Act requires postconviction petitioners to be provided notice and an opportunity to be heard prior to the trial court ruling on a motion to dismiss filed by the State during the second stage of postconviction proceedings." *Al Momani*, 2016 IL App (4th) 150192, ¶ 12, 55 N.E.3d 725. Such an opportunity may be satisfied "by allowing a hearing on the motion or by allowing defendant to file a written response to the motion." *Al Momani*, 2016 IL App (4th) 150192, ¶ 12, 55 N.E.3d 725.

¶ 20 In *Al Momani*, a case with similar facts and the same trial court judge as this case, we reversed the trial court's dismissal of the defendant's postconviction petition at the second

stage two days after the motion to dismiss was filed where the defendant was not provided notice or an opportunity to be heard first. *Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725. Under those circumstances, we found the trial court's dismissal "clearly violated the fundamental requirement of due process in these postconviction proceedings." *Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725.

¶ 21 In this case, the State filed its motion to dismiss on September 10, 2015. We note the State's affidavit of service does not appear in the record. However, the motion was sworn and signed on September 10, 2015. Although the record does not reflect when defendant or his counsel received the motion, it is unlikely it was received before the trial court granted it on September 11, 2015, *i.e.*, one day after it was filed. See *Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725 (finding it unlikely the defendant received the State's motion to dismiss before the trial court granted it two days after filing). Even assuming, *arguendo*, defendant in fact received the motion, he was not permitted a reasonable opportunity to respond to the motion. Granting the State's motion to dismiss defendant's amended postconviction petition under the circumstances presented in this case was error. As such, we must reverse the dismissal and remand to afford defendant the opportunity to respond to the State's motion. In so ruling, however, we make no findings on the merits of either the motion to dismiss or the postconviction petition.

¶ 22 As a final matter, we address defendant's assertion this case should be reassigned on remand to a different judge. While there is no absolute right to substitution of judge at a postconviction proceeding, a defendant may obtain a remand to a different judge if he shows "something more" than the fact the judge ruled against him or made erroneous rulings. *People v.*

Tally, 2014 IL App (5th) 120349, ¶ 44, 10 N.E.3d 468. "A defendant can show 'something more' by demonstrating 'animosity, hostility, ill will, or distrust' (*People v. Vance*, 76 Ill. 2d 171, 181[, 390 N.E.2d 867, 872] (1979)), or 'prejudice, predilections or arbitrariness' (*People v. McAndrew*, 96 Ill. App. 2d 441, 452[, 239 N.E.2d 314, 320] (1968))." *People v. Reyes*, 369 Ill. App. 3d 1, 25, 860 N.E.2d 488, 510 (2006).

¶ 23 In this case, the trial court appears to have improperly prejudged a central issue underlying defendant's postconviction petition by stating in its written order dismissing the petition at the first stage it would not have considered a postplea motion had one been filed. See *Reyes*, 369 Ill. App. 3d at 25-26, 860 N.E.2d at 510-11 (remanding for second-stage proceedings before a different judge where the original judge gave the impression of being unwilling to consider whether the defendants presented the gist of a meritorious claim). The crux of defendant's postconviction petition revolves around his claim his trial counsel ignored his request to file a postplea motion. The court's statement made clear it would have denied the motion regardless of the nature of any argument contained therein. Such a statement contributes to an appearance the court improperly prejudged the matter. That appearance is furthered by the court's improper dismissal of defendant's amended postconviction petition as discussed *supra*. Consequently, we find this case should be assigned to a different judge on remand. See *People v. Daly*, 2014 IL App (4th) 140624, ¶ 40, 21 N.E.3d 810.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we reverse the trial court's order granting the State's motion to dismiss and remand this case (1) to afford defendant the opportunity to respond to the State's motion, and (2) for the assignment of a new judge for further proceedings.

¶ 26 Reversed and remanded.