FIRST DIVISION
March 20, 2017

No. 1-13-3729

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. 04 CR 28085
	)	
DAVID WYNTER,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of defendant's post-conviction petition as frivolous and patently without merit is affirmed where defendant's claim that the trial court violated his right to a fair trial when it denied his request for a stand-by attorney has no arguable basis in law or fact. We also find that defendant's March 25th motion was not a post-conviction petition triggering the mandatory 90-day time limit for dismissal.

¶ 2 Defendant, David Wynter, appeals the order of the circuit court summarily dismissing his post-conviction petition as frivolous and patently without merit. On appeal, defendant contends (1) his *pro se* motion filed March 25, 2010, was a post-conviction petition that required the court

to dismiss it within 90 days or allow the petition to proceed to the second stage; (2) the trial court erred in dismissing his post-conviction petition filed June 11, 2013, where he claimed that his due process rights were violated when the trial court denied him a continuance after allowing defendant to proceed *pro se* at his trial, and denied his request for stand-by counsel; and (3) if this court reverses the trial court's dismissal and sends the cause back for second-stage proceedings, it should be assigned to a different judge. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court dismissed defendant's post-conviction petition on September 4, 2013. This court granted defendant leave to file a late notice of appeal, which he filed on January 29, 2014. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 The following facts are relevant to this appeal. Defendant was convicted of home invasion and aggravated criminal sexual assault after a jury trial, and sentenced to two consecutive 30-year prison terms to be served consecutively to a 15-year prison term from an unrelated case. During pretrial proceedings, defendant requested on several occasions to proceed *pro se*. The trial court admonished defendant each time and defendant agreed to allow the public defender to represent him after his first two requests. On June 10, 2009, defendant requested again to proceed *pro se*. He informed the court that he was "not satisfied with counsel's motion *** and the proceedings up to this point. I haven't seen a page of discovery. I'm prepared to proceed *pro se* from this moment on, you Honor, and accept the consequences of my choice."

¶ 7 The trial court once again admonished defendant and then stated that "it's 2009. After five years with the attorney's services and on the eve of trial, we have a firm trial date, you're going to

trial July 27th on this, I am loathe to let you come up at the last second with an idea of representing yourself." The court did not allow defendant to represent himself at this point, but informed him that it could "hold this matter over for a few weeks" if he was not ready to proceed. Defendant reiterated that he wanted to proceed *pro se* unless a trial demand was attached. The trial court reminded defendant that a trial date had been set for July 27, 2009, and that "[y]ou have about two months, a little shy of two months now to get ready." The parties agreed to start the trial on July 27, 2009.

¶ 8 On the day of trial, immediately prior to selecting a jury, defendant stated to the court that his counsel was ineffective. The trial court extensively admonished defendant about the perils of self-representation, including the fact that he would not receive extra time to prepare for trial and he could not change his mind about representation during trial. After the admonishments, defendant indicated that he would like to represent himself at trial. Defendant then asked for a fitness hearing. The trial court had defendant examined that same day by Dr. Peter Lourgos. Dr. Lourgos testified at the hearing that he examined defendant and reviewed reports from defendant's previous examinations, and he found defendant fit to stand trial. Defendant, representing himself, asked Dr. Lourgos whether defendant's history of bipolar disorder and other mental health issues would affect his ability to proceed *pro se*. Dr. Lourgos responded that he did not think it would affect defendant's ability to represent himself. The trial court found defendant fit to stand trial.

¶ 9 After the jury had been selected and prior to opening statements, defendant told the court that he just received an extraordinary amount of discovery materials and needed more time to prepare for trial. The trial court responded that they have had the discussion of defendant's self-representation for months and that two months earlier defendant was "very angry" at his

counsel for not demanding trial. The court reminded defendant that he said he was ready to go to trial and "cannot now say after the jury has been picked that you need more time. I find the request is disingenuous, it's dilatory, it's a stalling tactic. You're attempting to thwart the effective administration of justice. You said you were ready. Against my every plea an [*sic*] cajoling, you said you were ready and you wanted to go to trial today." The trial court denied defendant's request.

¶ 10 After presentation of the evidence, the jury convicted defendant on both counts. Defendant was sentenced on January 8, 2010, and that same day he filed a motion for a new trial in which he argued that the trial court erred in denying his request to proceed *pro se* after the June 10, 2009, hearing. The trial court denied defendant's motion, finding that after he was admonished about representing himself, defendant "chose not to." The trial court appointed an attorney to represent defendant for post-trial motions and sentencing, and on January 11, 2010, the attorney filed a notice of appeal on defendant's behalf. On January 22, 2010, the trial court appointed the State appellate defender to represent defendant on appeal.

¶ 11 While the appeal was pending, defendant filed a *pro se* "motion to arrest judgment" to vacate the jury's guilty verdict which the trial court dismissed on February 16, 2010. On February 18, 2010, defendant filed a *pro se* "motion to reconsider motion to vacate finding of guilt/motion for a new trial/motion to reduce sentence" alleging 186 points of error. The transcript of the hearing on defendant's motion is not contained in the record; however, the memorandum of orders indicates that on February 25, 2010, the trial court entered an order stating that the case was "on call in error."

¶ 12 On March 25, 2010, defendant filed a two-page *pro se* motion titled "MOTION TO RECHARACTERIZE DEFENDANT'S PRO SE MOTION TO RECONSIDER MOTION TO

VACATE FINDING OF GUILT/MOTION FOR NEW TRIAL/MOTION TO REDUCE SENTENCE AND CONSIDER IT A POST CONVICTION PETITION." The motion did not raise new substantive issues regarding defendant's conviction, but instead cited to case law that the trial court has discretion to recharacterize filings, and that the substance of pleadings and not the title controls the petition's identity. Defendant also argued, without more, that his "conviction was obtained in violation of [his] 4th, 5th, 6th, and 14th amendment rights." Defendant's case came before the trial court on April 15, 2010, and the trial judge stated that she did not know why the case was on her call because defendant had not filed any motions. The trial judge stated that the case was over with and was on call in error. However, on July 15, 2010, the trial court stated that it had "already ruled on some motions that he has filed. Apparently he's filed another one which I will have to read." It is unclear whether the trial judge was referring to the March 25th motion. No further references on defendant's motion are found in the record.

¶ 13 On direct appeal, defendant argued that (1) he was deprived of his right to represent himself; (2) his sixth amendment right to confront witnesses against him was violated when the State's expert witnesses testified about deoxyribonucleic acid (DNA) extraction; and (3) his sentence was excessive. This court affirmed defendant's convictions and sentence in an unpublished order filed on June 19, 2012 (*People v. Wynter*, 2012 IL App (1st) 100258 (unpublished order under Illinois Supreme Court Rule 23(b) (eff. July 1, 2011)).

¶ 14 On June 13, 2013, defendant filed a *pro se* petition for post-conviction relief. In his petition, defendant made numerous claims including (1) the trial court erred in denying his motion to quash arrest and suppress the DNA evidence that was obtained from him; (2) ineffective assistance of appellate counsel for failing to raise the DNA issue on appeal, and bypassing other "meritorious issues;" (3) ineffective assistance of trial counsels for failing to

demand trial prior to the July 27, 2009, trial date; (4) the trial court erred in denying his request for a continuance on the day of trial; (5) his right to a speedy trial was violated; (6) his right to self-representation was denied; (7) his right to be represented by counsel of his choice was denied; and (8) the appellate court's determination in *Wynter* was error. The trial court dismissed defendant's petition as frivolous and without merit, finding that his claims were already decided or could have been raised on direct appeal, were positively rebutted by the record, or were unsupported. Defendant filed this appeal.

¶ 15 ANALYSIS

¶ 16 Defendant first contends that his March 25, 2010, filing was a post-conviction petition, and since the trial court never ruled on his petition within 90 days of the filing date, his cause must be remanded for second stage post-conviction proceedings. Section 122-2.1(a) of the Post-Conviction Hearing Act (Act), provides that "[w]ithin 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section." 725 ILCS 5/122-2.1(a) (West 2010). The 90-day time limit is mandatory and failure to comply requires that a petition be docketed for second stage proceedings. *People v. Harris*, 224 Ill. 2d 115, 129 (2007). Section 122-1(d) of the Act further provides that:

> "[a] person seeking relief by filing a petition under this Section must specify in the petition or its heading that it is filed under this Section. A trial court that has received a petition complaining of a conviction or sentence that fails to specify in the petition or its heading that it is filed under this Section need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article." 725 ILCS 5/122-1(d) (West 2010).

While section 122-1(d) allows the trial court to treat a *pro se* pleading as a post-conviction petition, the trial court is not required to do so. *People v. Shellstrom*, 216 Ill. 2d 45, 53 (2005).

¶ 17 Defendant's March 25th filing is titled "MOTION TO RECHARACTERIZE DEFENDANT'S PRO SE MOTION TO RECONSIDER MOTION TO VACATE FINDING OF GUILT/MOTION FOR NEW TRIAL/MOTION TO REDUCE SENTENCE AND CONSIDER IT A POST CONVICTION PETITION." The title refers to defendant's previous *pro se* filing on February 18, 2010, of his "motion to reconsider motion to vacate finding of guilt/motion for a new trial/motion to reduce sentence" that alleged 186 points of error. The February 18th filing, however, did not indicate it was a post-conviction petition in the heading or within the petition. We find that defendant's March 25th filing was not a post-conviction petition; rather, it was a motion asking the trial court to recharacterize his earlier February 18th motion to reconsider as a post-conviction petition. The substance of the March 25th motion also supports our determination. The two-page motion briefly stated law regarding the recharacterization of filings as post-conviction petitions, and general post-conviction law, without raising substantive issues. "The nature of a motion is determined by its substance rather than its caption." *J.D. Marshall International, Inc. v. First National Bank of Chicago*, 272 Ill. App. 3d 883, 888 (1995). Since defendant's March 25th motion was not a filing of a post-conviction petition, the 90-day rule of section 122-2.1(a) does not apply.

¶ 18 We are not persuaded by defendant's citations to cases in support of his position that the March 25th filing was a post-conviction petition. In *People v. McDonald*, 373 Ill. App. 3d 876, 877 (2007) and *People v. Shipp*, 375 Ill. App. 3d 829, 830-31 (2007), each of the defendants' *pro se* filings at issue clearly stated it was a "Post-Conviction Petition" or petition for relief "pursuant to the Illinois Post-Conviction Act," and no prior substantive filings had been made without

reference to the Act. This court in both cases determined that the petition at issue was a post-conviction petition. *McDonald*, 373 Ill. App. 3d at 880; *Shipp*, 375 Ill. App. 3d at 832. In contrast, on February 18, 2010, defendant here filed a motion to reconsider the trial court's dismissal of another motion, with no mention of "post-conviction" contained therein. On March 25, 2010, defendant filed a motion to recharacterize his February 18, 2010, motion to reconsider as a post-conviction petition. Although the term "post-conviction" does appear on the March 25th motion, unlike the filings in *McDonald* and *Shipp*, defendant's two-page motion was not a stand-alone filing for post-conviction relief. Instead, it merely requested that the trial court recharacterize defendant's February 18th motion as a post-conviction petition which the trial court, in its discretion, may grant or deny.

¶ 19 Furthermore, the record does not indicate whether the trial court even reviewed or considered defendant's March 25th motion. The trial court's order from which defendant now appeals states that "[t]he 'motion to reconsider motion to vacate finding of guilt/motion for new trial/motion to reduce sentence' was dismissed by Judge Petrone," but is silent as to the March 25th motion. The record also contains no further references to the March 25th motion. The trial court's failure to rule on defendant's motion does not constitute a denial. *Rodriguez v. Prisoner Review Board*, 376 Ill. App. 3d 429, 432 (2007). Rather, "it is the responsibility of the party filing a motion to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise." *Id*. at 433. Since defendant did not request that the trial court rule on his March 25th motion, when the court had not ruled on it, he effectively abandoned the motion.

¶ 20 Defendant next argues that the trial court erred in dismissing his post-conviction petition filed June 11, 2013, as frivolous and patently without merit. The Act provides a procedural

mechanism in which a convicted criminal can claim that a violation of his constitutional rights occurred in the proceedings which resulted in his conviction. *Harris*, 224 Ill. 2d at 124. Post-conviction proceedings are not appeals from the underlying case; "[r]ather, a postconviction proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial." *Id*. Therefore, post-conviction proceedings are limited to matters that have not been, nor could have been, adjudicated in a prior proceeding. *Id*. "Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues that have previously been decided by a reviewing court are barred by *res judicata*." *Id*. at 124-25.

¶ 21 The trial court dismissed defendant's petition at the first stage of post-conviction proceedings. At this stage, if the trial court finds that the petition is frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a) (West 2012). A petition is frivolous and patently without merit when the allegations, taken as true and liberally construed, do not present a gist of a constitutional claim. *People v. Edwards* , 197 Ill. 2d 239, 244 (2001). "Gist" is a "low threshold" and defendant "need only present a limited amount of detail" to set forth his claim. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). However, if a petition has no arguable basis in law or fact, or is contradicted by the record, it will be deemed frivolous and patently without merit. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). We review the trial court's dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 22 On appeal, defendant argues that his petition presented a gist of a claim where he alleged that he was denied due process when on the first day of trial, the court granted defendant's request to proceed *pro se* but then denied his request for a continuance. Defendant contends that

given the daunting task of representing himself on the day of trial, the trial court should have granted his request for a continuance or his request for stand-by counsel, and the trial court's denial violated his right to a fair, procedurally sound trial. Defendant could have raised this issue on direct appeal, but did not do so. Therefore, he has forfeited review of the issue here. *Harris*, 224 Ill. 2d at 124.

¶ 23 Furthermore, defendant argues on the one hand that he desired and was determined to proceed to trial *pro se*, and on the other hand that the trial court improperly denied his request for stand-by counsel after allowing him to proceed *pro se*. In his post-conviction petition, defendant stated that he informed the trial judge he "was fine with the July 27, 2009, trial date" and although he had "never seen any of the State's discovery response [he] was determined to represent [him]self at trial." He told the judge that he would "telephone counsel *** to at least get some information to prepare [his] own case for trial, [in order to] stop the court from continuing to attempt to force [him] to accept the public defender as trial counsel which [he] was determined not to do under any circumstances." Defendant then contended that he also attempted to retain stand-by counsel on the day of trial, but the trial court denied his request and as a result, he was "denied a fair trial as the court would only allow me to proceed *pro se*." Defendant understood the trial court's admonishments but emphatically stated that he wanted to represent himself. He assured the court that he was ready for trial. He cannot complain of errors resulting from his own conduct. *People v Allen*, 401 Ill. App. 3d 840, 854 (2010).

¶ 24 Also, defendant here "seeks the best of both worlds: freedom to conduct his own defense and benefit from the assistance of counsel." *People v. Graves*, 134 Ill. App. 3d 473, 477 (1984). "A *pro se* defendant's inability to represent himself competently does not invest the court with a duty to intervene and assist in the defense." *Id.* at 477. Defendant "has no right to both *pro se*

representation and the assistance of counsel" under Illinois law, and no such right exists under the United States Constitution. *Id*. at 477-78. Therefore, defendant's claim has no arguable basis in law or fact, and the trial court properly dismissed his petition as frivolous and patently without merit.

¶ 25 In his reply brief, defendant argues for the first time on appeal that his appellate counsel was ineffective for failing to raise the continuance/stand-by counsel issue on direct appeal. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), requires that the appellant's brief include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on" and that "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Therefore, defendant has waived this argument on appeal. In any event, given our finding above that no error occurred when the trial court denied defendant's request for a continuance/standby-counsel, appellate counsel did not provide ineffective assistance by failing to raise the issue on direct appeal. *People v. Logan*, 2011 IL App (1st) 093582, ¶ 48.

¶ 26 Due to our disposition of defendant's appeal, we need not consider defendant's argument that upon remand for second-stage proceedings, his motion for substitution of judge should be granted.

¶ 27 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.