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2020 IL App (3d) 180015-U

Order filed July 17, 2020

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-18-0015 Circuit No. 06-CF-78
PATRICK V. BAKATURSKI,)	Honorable Michael D. Risinger,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The court abused its discretion in denying defendant's request to proceed *pro se* on the basis that it was not in his best interest.
- ¶ 2 Defendant, Patrick V. Bakaturski, appeals the Tazewell County circuit court's dismissal of his postconviction petition at the second stage of proceedings. Defendant argues that the court erred in denying his request to represent himself. Defendant also argues that the court erred in conducting simultaneous hearings on postconviction counsel's motion to withdraw and the State's motion to dismiss. We vacate and remand with directions.

¶ 3

I. BACKGROUND

¶ 4

Defendant pled guilty to two counts of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2006)) pursuant to a partial plea agreement. The court sentenced defendant to consecutive sentences of 10 years' and 30 years' imprisonment. On direct appeal, defendant argued that his sentence was excessive, and we affirmed. *People v. Bakaturski*, No. 3-08-0663 (2010) (unpublished order under Illinois Supreme Court Rule 23). Our order was filed on December 1, 2010.

¶ 5

On May 26, 2016, defendant filed a "Late *Pro Se* Post-Conviction Petition." In the petition, defendant acknowledged that the petition was not timely filed but claimed that this was not due to his culpable negligence. The court advanced the petition to the second stage of postconviction proceedings. Defendant filed a motion for the appointment of counsel other than the public defender's office. The court appointed the public defender as defendant's counsel.

¶ 6

On March 13, 2017, defendant filed a *pro se* motion titled "Motion to Remove Counsel, Hold Kraincal [*sic*] Hearing, Replace Counsel, set guidelines for Effective Post-Conviction Counsel, and/or Defendant will proceed as a *pro se* Defendant." The motion alleged that appointed counsel had refused to speak to defendant or allow him to take part in his own defense. The motion requested that counsel be removed.

¶ 7

The court reassigned the matter to a different judge.

¶ 8

Postconviction counsel filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). The motion alleged that defendant's postconviction claims were meritless. The motion also stated that the petition was untimely, and the allegations in the petition did not show that the delay in filing was not due to defendant's culpable negligence.

¶ 9

The State filed a motion to dismiss defendant's postconviction petition.

¶ 10 Defendant filed *pro se* responses to postconviction counsel's *Greer* motion and the State's motion to dismiss.

¶ 11 At a status hearing on November 17, 2017, postconviction counsel advised the court that defendant did not object to counsel withdrawing and defendant proceeding as a self-represented litigant. The court asked the State for its position on defendant representing himself. The assistant state's attorney stated that he believed that it would be best for defendant to be represented in the interest of protecting the record, protecting defendant's rights, and preventing the proceedings from being delayed or overly confusing. The State noted that defendant had not filed a motion to represent himself and stated that was something that defendant would need to do.

¶ 12 Defendant began talking about some of his claims. The assistant state's attorney stated that defendant seemed to be confused as to the rules that applied to the proceeding, which indicated that representing himself would not be a good choice for him. Defendant replied: "Well, if [postconviction counsel] withdraws, regardless, I'm going to be *pro se*. Regardless, I'm going to have to defend myself if he is allowed to withdraw." Postconviction counsel noted that his motion to withdraw was based on his view that defendant's claims were frivolous. Postconviction counsel reiterated that defendant wanted him to withdraw and stated that he was willing to do so if the court would allow it. The court stated that it believed that it was good for defendant to be represented by an attorney because it appeared that the claims raised in one of his *pro se* motions had no applicability to the proceedings.

¶ 13 On November 28, 2017, defendant filed a motion to proceed as a self-represented litigant. Defendant alleged that it put an undue burden on him to have to defend against postconviction counsel's motion to withdraw and "at the same time not really be given any way to address the

State directly.” Defendant alleged that the State wanted postconviction counsel to continue to represent defendant solely because it aided the State’s case.

¶ 14 A hearing was held on postconviction counsel’s motion to withdraw and the State’s motion to dismiss. At the beginning of the hearing, postconviction counsel requested that the court address defendant’s motion to represent himself. Postconviction counsel noted that if the motion was granted, he would be out of the case for reasons other than his *Greer* motion. Postconviction counsel also noted that granting defendant’s motion to represent himself would have the effect of defendant not feeling “double teamed” by having two attorneys arguing against his claims.

¶ 15 The court denied defendant’s motion to represent himself on the basis that it was not in defendant’s best interest. The court reasoned that defendant “desperately need[ed] some counsel” and postconviction counsel was the only one familiar enough with the case to provide it to him. Postconviction counsel stated that he did not believe that it was in defendant’s best interest to keep him as counsel because he had filed a motion to withdraw arguing that defendant’s claims were frivolous. The court again stated that the motion was denied.

¶ 16 The court then had the State and postconviction counsel make arguments concerning their respective motions. The court also allowed defendant to respond to their arguments. After hearing arguments, the court simultaneously granted postconviction counsel’s motion to withdraw and the State’s motion to dismiss.

¶ 17 **II. ANALYSIS**

¶ 18 Defendant argues that the circuit court erred by denying his unequivocal request to represent himself during postconviction proceedings. We find that the court abused its discretion in denying defendant’s request on the basis that it was not in his best interest.

¶ 19 During the second and third stages of postconviction proceedings, defendants have a statutory right to counsel. *People v. Lesley*, 2018 IL 122100, ¶ 33. “Commensurate with Illinois’s statutory right to appointed counsel in postconviction proceedings is a defendant’s ability to waive that right, so long as the defendant’s waiver is voluntary, knowing, and intelligent.” *Id.* ¶ 50. “The requirement of a knowing and intelligent choice calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.* ¶ 51.

¶ 20 The waiver of the right to counsel must be “ ‘clear and unequivocal, not ambiguous.’ ” *Id.* ¶ 34 (quoting *People v. Baez*, 241 Ill. 2d 44, 116 (2011)). “A request to proceed *pro se* may reasonably be rejected where it come[s] so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings or where a defendant engages in serious and obstructionist misconduct.” (Internal quotation marks omitted.) *People v. Gray*, 2013 IL App (1st) 101064, ¶ 25 (quoting *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 24, quoting *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991)). The determination of whether there has been a knowing and intelligent waiver of the right to counsel is reviewed for abuse of discretion. *Id.* ¶ 23.

¶ 21 We find the First District’s decision in *Gray*, 2013 IL App (1st) 101064, to be instructive. In *Gray*, the defendant filed a *pro se* postconviction petition and several *pro se* amendments and supplements to the petition. *Id.* ¶¶ 8-13. Appointed counsel indicated that he was unable to amend or supplement the defendant’s claims. *Id.* ¶ 14. Counsel advised the circuit court that the defendant wanted to represent himself so that the issues he had raised in his *pro se* filings could be considered by the court. *Id.* ¶ 15. The circuit court indicated that it would not consider the defendant’s *pro se* amendments if the defendant was represented by counsel. *Id.* The defendant

filed a *pro se* motion asking the court to consider the claims in his *pro se* amendments. *Id.* At the next hearing, defense counsel suggested that the defendant should be brought to court to assert his right to represent himself. *Id.* ¶ 18. The circuit court stated that this suggestion was a dilatory tactic and struck the defendant's *pro se* filings. *Id.* The court granted the State's motion to dismiss. *Id.* ¶ 19.

¶ 22 The appellate court held that the circuit court “abused its discretion by failing to grant, or even expressly rule upon, [the] defendant’s request to proceed *pro se*.” *Id.* ¶ 24. The *Gray* court found that there was a statutory right to self-representation under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). *Gray*, 2013 IL App (1st) 101064, ¶ 22. The court reasoned that the defendant’s request to represent himself was clear and unambiguous. *Id.* ¶ 23. The court also found that the defendant’s request to represent himself was not a dilatory tactic because it arose shortly after his counsel refused to make or endorse the *pro se* amendments to the petition and the court refused to consider the amendments under such circumstances. *Id.* ¶ 25. The *Gray* court vacated the dismissal of the defendant’s petition and remanded the matter for further proceedings for the court to determine whether the defendant knowingly and intelligently relinquished his right to counsel. *Id.* ¶ 27.

¶ 23 Here, like in *Gray*, defendant made multiple unambiguous requests to represent himself. Defendant’s first request to represent himself came in March 2017 when he filed his “Motion to Remove Counsel, Hold Kraincal [*sic*] Hearing, Replace Counsel, set guidelines for Effective Post-Conviction Counsel, and/or Defendant will proceed as a *pro se* Defendant,” which was never ruled upon. This request was arguably ambiguous because defendant alternatively sought new counsel. However, after counsel filed his *Greer* motion, defendant made several clear and unambiguous requests to represent himself. As in *Gray*, we do not believe that defendant’s

requests to proceed *pro se* were dilatory. His first request in March 2017 came relatively early in the proceedings. The remaining requests came soon after counsel filed his *Greer* motion, at which point it became clear that the only way that defendant would be able to defend against the State's motion to dismiss was to represent himself.

¶ 24 We conclude that the court abused its discretion in denying defendant's request to represent himself on the basis that it was not in his best interest. Once the defendant made his clear and unambiguous request to represent himself, the court should have determined whether he was knowingly and intelligently waiving his right to counsel. If the court determined that defendant's waiver was knowing and intelligent, the court should have granted the motion even if it believed defendant's decision was unwise. See *Baez*, 241 Ill. 2d at 116 ("Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted.").

¶ 25 We reject the State's argument that defendant has forfeited this issue by failing to raise it in the circuit court. The record shows that defendant repeatedly requested to proceed *pro se* in the circuit court, and the court considered and denied this request. We also reject the State's argument that defendant invited the error because he agreed to the court's procedure on the simultaneous hearing on defense counsel's *Greer* motion and the State's motion to dismiss. This hearing occurred *after* the court denied defendant's request to proceed *pro se*, and it is irrelevant to defendant's claim that the court erred in denying his request to represent himself.

¶ 26 We also reject the State's claim that it would be a waste of judicial resources to vacate the circuit court's order and remand the matter for a new hearing. The State essentially argues that any error was harmless because defendant's petition was untimely. However, we find that harmless error analysis is inapplicable to this claim. Errors concerning the statutory right to

counsel in postconviction proceedings are typically not subject to harmless error analysis. See *People v. Suarez*, 224 Ill. 2d 37, 52 (2007) (holding that postconviction counsel’s failure to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) was not subject to harmless error analysis); *People v. Dixon*, 2019 IL App (1st) 160443, ¶ 57 (“We are unaware of cases in the postconviction context where a court has excused procedural error because it believes the petition did not have merit. Actually, the cases suggest the opposite.”).

¶ 27 Because we have resolved this issue on defendant’s statutory right to represent himself during postconviction proceedings, we do not consider defendant’s claim that he also had a constitutional right to represent himself. Also, because we vacate the judgment of the circuit court and remand for further proceedings, we do not reach the second issue raised in this appeal—namely, that the court erred in conducting simultaneous hearings on counsel’s *Greer* motion and the State’s motion to dismiss.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of Tazewell County is vacated. The matter is remanded for the court to conduct a hearing on defendant’s motion to proceed *pro se* and for further second-stage proceedings. Specifically, the court is directed to determine whether defendant knowingly and intelligently waives his right to counsel. If the court permits defendant to represent himself, the court should give defendant an appropriate amount of time to review any discovery he may be entitled to.

¶ 30 Vacated and remanded with directions.