

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).

2012 IL App (3d) 110555-U

Order filed July 2, 2012

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. 3-11-0555
) Circuit No. 06-CF-1132
)
BILLY L. BAILEY,) Honorable
) Sarah-Marie F. Jones,
Defendant-Appellant.) Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) A postconviction petition should not be summarily dismissed for lack of a valid verification at the first stage of the postconviction proceedings because the defect is procedural rather than substantive; (2) defendant's postconviction petition was properly dismissed as frivolous and patently without merit.

¶ 2 Defendant, Billy L. Bailey, entered a blind plea of guilty to unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(C) (West 2006)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). He was sentenced to

concurrent terms of 17 and 10 years of imprisonment, respectively. Defendant filed a postconviction petition (725 ILCS 5/122-2.1 (West 2010)), which was summarily dismissed at the first stage of the proceedings. On appeal, defendant argues the circuit court erred in dismissing his petition because it stated the gist of a constitutional claim, alleging that: (1) the trial court erred in denying his trial counsel's request for a continuance on the day of trial; (2) he was denied his right to counsel of choice; (3) defendant received ineffective assistance of trial counsel; (4) the trial court erred in denying defendant's motion to withdraw his guilty plea; and (5) he received ineffective assistance of appellate counsel. We affirm.

¶ 3

FACTS

¶ 4 On May 8, 2006, defendant was charged with unlawful possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon. A preliminary hearing was set for June 5, 2006, and was continued by agreement of the parties. On July 6, 2006, defendant requested the discharge of his private attorney and appointment of the public defender. The court allowed defendant's attorney leave to withdraw. Later the same day, defendant requested a two-week continuance for time to hire a private attorney, which was granted. On July 20, 2006, a preliminary hearing took place, and Paul Napolski filed his appearance as counsel for defendant.

¶ 5 On August 17, 2006, a pretrial hearing took place. Defense counsel indicated to the court that he was "trying to reach some kind of an agreement [with the State]" and requested a one-week continuance. On August 24, 2006, defense counsel indicated he was "looking for a 60-day pretrial." The trial judge stated, "That's it. Pick one final pretrial and trial [is set for] that day." At the request of defense counsel, the pretrial conference was set for October 31, 2006.

¶ 6 On October 31, 2006, defense counsel indicated to the court:

"Judge, I spoke with [the State's attorney] this morning. We're still waiting on the labs to come back. [The State] and I have been in negotiation on this matter. I'd be asking to set it over to December 29th for status and further pre-trial. Hopefully, we'll be able to get a resolution between now and then."

The trial judge allowed the continuance and indicated, "Final pre-trial or trial setting. Okay?"

Defense counsel agreed, stating, "Yes, Judge."

¶ 7 On December 29, 2006, defense counsel requested a 30-day continuance because he was "trying to finalize his investigation on this [case]." At the request of defense counsel, trial was set for March 20, 2007. On February 25, 2007, as the result of a shooting, defendant was paralyzed and confined to a wheelchair while released on bond. At the request of defense counsel, due to defendant's physical condition slowing the progress of case, the case was continued until May 15, 2007, and again to June 22, 2007. Due to defense counsel being ill with strep throat, the case was continued to July 23, 2007. On July 23, 2007, the case was set for trial on October 29, 2007.

¶ 8 On October 29, 2007, defendant's attorney indicated that the defense was not ready for trial because the State had recently tendered additional discovery that he wished to review. The case was continued for jury trial to November 5, 2007. At the request of defense counsel to pursue plea negotiations with the State, the case was again continued until November 19, 2007.

¶ 9 On November 19, 2007, defense counsel requested a continuance until December 10, 2007, and the following colloquy took place:

"[STATE'S ATTORNEY]: *** I do not have an objection to that. I will be ready

on the 10th.

[DEFENDANT'S ATTORNEY]: As will I.

THE COURT: With that assurance, December 10."

¶ 10 On December 10, 2007, the defendant's attorney indicated, "I do not believe that we are ready for trial." The trial judge stated, "You're ready." Defendant's attorney indicated he was making a motion to continue, and the trial judge stated, "Absolutely not" and "I made it clear last time." Defendant indicated that he wanted to address the court, and his counsel indicated that he did not have an objection to defendant addressing the court. The trial judge stated:

"No, no, no. I set this trial in July. In November I heard you weren't ready. You wanted to talk to the State. I gave it another court date and trial date. Again, I heard the same thing. Today I made absolutely positively certain the last minutes we had there would be no continuances. It was either three choices, the State dismiss the case, [defendant] pleads, [or] we go to trial.

That being said, we're going to trial. See everybody back here at 1:30 [p.m.] for jury selection."

¶ 11 After reconvening at 1:30 p.m., defendant indicated that he wished to enter a blind plea of guilty. He confirmed that he understood that the minimum sentence was 12 years of imprisonment and he did not have any agreement with the State. The factual basis for defendant's plea indicated that the execution of a search warrant of defendant's apartment resulted in proof of residency and the seizure of two guns, 500 grams of cocaine, \$6,000 in cash, digital scales, a razor blade, and sandwich baggies. Defendant's attorney indicated that the two guns were registered to defendant's fiancée, who resided in the home and had a valid FOID card.

¶ 12 In accepting defendant's guilty plea, the following colloquy took place:

"THE COURT: Lastly, if I accept this plea, the only thing left to do is pass sentence. I'm not bound by any agreement. There's no agreement here, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. So I'll be the one that makes that decision as to what sentence you get, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you want to go on with your plea?

THE DEFENDANT: Yes."

Defendant also confirmed that he had "fully discussed the entry of th[e] guilty plea with [his] attorney," who had explained his rights, as well as the consequences of the plea. Defendant confirmed that he was voluntarily entering the guilty plea of his own free will and not due to "any other promises, force or threats made against [him.]" The trial court asked if defendant was satisfied with his attorney, and the following colloquy took place:

"THE DEFENDANT: No.

THE COURT: You are not satisfied?

THE DEFENDANT: No.

THE COURT: What's the issue?

THE DEFENDANT: *** My whole thing was I wasn't going to go to trial. I was going to take a plea and plead guilty to it[.] *** I have been telling my attorney to try to *** tell you, Your Honor, we're trying to do something with the State to make a plea

and wrap all this up. *** [A]t the same time kept on telling him I'm not going to trial, I'm not going to trial. I wanted him to come to you and tell that to you at the beginning. Like, Your Honor, we're not going to trial so we just need a certain amount of time to try to get something worked out with the State.

THE COURT: You know, the problem with that *** is that the State doesn't have to agree to anything.

THE DEFENDANT: Exactly.

THE COURT: You found that out.

THE DEFENDANT: Yes.

THE COURT: I gave your attorney a couple of continuances to try to talk to the State to see whether or not they would do something for you. If that's your only dissatisfaction, you should understand that there is just so much any attorney can do if the State says *** we're not making an offer.

Once that happens, you can be dissatisfied about that, but he doesn't have any power to force the State to make an agreement. They don't have to. Is that your only complaint about it?

THE DEFENDANT: Yes.

THE COURT: ***

Knowing the matters the Court's informed you of, having heard your rights, your right to trial, do you still wish to plead guilty to these two charges?

THE DEFENDANT: Yes."

¶ 13 On January 8, 2008, defendant filed a motion to withdraw his guilty plea, which was

denied.

¶ 14 On March 18, 2008, at sentencing, the trial court imposed a sentence of 17 years of imprisonment for unlawful possession of a controlled substance with intent to deliver and 10 years of imprisonment for unlawful use of a weapon by a felon. A \$50,000 street value fine was also imposed. Defendant filed a motion to reconsider sentence, which was denied. Defendant appealed, arguing that his prison sentences were excessive and the street value fine was improper. This court affirmed defendant's conviction and prison sentences, but vacated the street value fine and remanded the case for the trial court to reconsider the value of the fine. *People v. Bailey*, No. 3-08-0539 (2010) (unpublished order under Supreme Court Rule 23).

¶ 15 On April 13, 2011, defendant filed a postconviction petition. In the petition, defendant argued that: (1) the trial court erred in denying his counsel's request for a continuance on the day of trial; (2) defendant was denied his counsel of choice; (3) defendant received ineffective assistance of trial counsel; (4) the trial court erred in denying defendant's motion to withdraw his guilty plea; and (5) defendant received ineffective assistance of appellate counsel on direct appeal. The trial court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant alleges the trial court erred in dismissing his postconviction petition because the allegations stated the gist of a constitutional claim. We disagree.

¶ 18 First, we address the State's argument that defendant's petition was properly dismissed because it was technically defective in that it did not contain a verification by affidavit, as required by section 122-1(b) of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.*

(West 2010)). Section 122-1(b) provides, "the [postconviction] proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition *** verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). Pleading verifications confirm that the allegations are brought truthfully and in good faith. *People v. Collins*, 202 Ill. 2d 59 (2002). Affidavits filed pursuant to the Act must be notarized to be valid. *People v. Carr*, 407 Ill. App. 3d 513 (2011).

¶ 19 The State acknowledges that defendant filed a notarized affidavit. However, citing *People v. McCoy*, 2011 IL App (2d) 100424, the State argues that "the affidavit defendant filed does not also satisfy the verification requirement of section 122-1(b)." In *McCoy*, the appellate court held that the lack of notarization of defendant's verification page was a proper basis to affirm the petition's dismissal. *McCoy*, 2011 IL App (2d) 100424. Also in *McCoy*, the appellate court noted that defendant's evidentiary affidavit was notarized but could not serve as a verification because the statements contained therein "were sufficiently vague that [the defendant] avoided swearing to the truth of the essential details[,] which left the petition "essentially unverified." *McCoy*, 2011 IL App (2d) 100424, ¶ 12.

¶ 20 In this case, as the State acknowledged, defendant's postconviction petition included a notarized affidavit attesting to various underlying facts about the case. Defendant's notarized affidavit also indicated that he read the affidavit, had personal knowledge of the facts and statements contained in the affidavit, and swore that the statements were "true and correct to the best of [his] knowledge, information and belief." The State does not specify in what regard it claims that defendant's verification was deficient. The affidavit appears to sufficiently confirm that defendant's allegations were brought truthfully and in good faith.

¶ 21 Nonetheless, regardless of whether the language of the affidavit was insufficient, the lack

of verification is merely a procedural defect in the postconviction petition proceedings, and at the first stage of the proceedings the court looks only at the substantive merits of the petition.

People v. Henderson, 2011 IL App (1st) 090923. At the first stage of the proceedings, the trial court must independently determine whether the petition is "frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). The summary dismissal of a postconviction petition at the first stage is warranted only if the petition's allegations, liberally construed in favor of the petitioner, fail to make a substantial showing of a constitutional claim. *People v. Coleman*, 183 Ill. 2d 366 (1998).

¶ 22 Consequently, the purpose of the Act would be hindered by preventing petitions that are neither frivolous nor patently without merit from proceeding to the second stage, where the State has the opportunity to object and defense counsel has the opportunity to make any necessary amendments. See *People v. Terry*, 2012 IL App. (4th) 100205; *Henderson*, 2011 IL App (1st) 090923. Therefore, the first stage of the postconviction proceedings measures a petition's substantive virtue rather than its procedural compliance with the requirements for verifying the petition. Thus, we find that the petition was not so technically deficient to merit dismissal at the first stage of the proceedings.

¶ 23 Accordingly, we next address the merits of defendant's petition to determine whether the summary dismissal of the petition was proper. We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 24 I. Denial of Defendant's Request for a Continuance

¶ 25 Defendant contends that the trial court erred in refusing to grant his counsel's motion for a

continuance, thereby forcing defendant to choose between pleading guilty or going to trial with unprepared counsel.

¶ 26 The State argues that defendant forfeited this issue because defendant failed to raise issue in a posttrial motion or on direct appeal. *People v. Pistonbarger*, 205 Ill. 2d 444 (2002) (providing that postconviction proceedings allow inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal so that issues that could have been raised, but were not, are considered waived). We agree that defendant waived this issue by failing to raise it in a postplea motion or on direct appeal.

¶ 27 Furthermore, as for defendant's contentions that the denial of the continuance raised constitutional concerns resulting from defense counsel being unprepared on the day of trial, the record indicates that no error was committed by the trial judge's denial of the continuance. The constitutional right to counsel incorporates the right to counsel with adequate time to prepare. *People v. Trolia*, 107 Ill. App. 3d 487 (1982), citing *People v. Massarella*, 80 Ill. App. 3d 552 (1979). However, "[a]ll motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant." 725 ILCS 5/114-4(e) (West 2010). Unless it appears that the trial court's denial of a motion for a continuance embarrassed the accused in preparing his defense or prejudiced his rights, the conviction should be affirmed. *Trolia*, 107 Ill. App. 3d 487; *People v. Flores*, 269 Ill. App. 3d 196 (1995). A trial court's ruling on a motion to continue is evaluated on the facts and circumstances of the case, and a defendant may be forced to trial where there is no showing of diligence. *Trolia*, 107 Ill. App. 3d 487, citing *People v. King*, 66 Ill. 2d 551 (1977).

¶ 28 In this case, the trial court did not abuse its discretion in denying defendant's motion to

continue. Defendant was granted continuances from July 6, 2006, through December 7, 2007, with no indication that defense counsel would have been any better prepared for trial with the grant of another continuance. Defense counsel had adequate time to prepare for trial.

¶ 29 Additionally, there is no indication that defendant was prejudiced by the denial of the continuance. The record indicates that defendant intended to plead guilty and avoid trial. The defendant waited as long as possible for the State to extend a plea offer, which never occurred. The State was not obligated to extend a plea offer, and the parties never had a plea agreement. At some point, defendant would have had to choose between pleading guilty or going to trial. He chose to plead guilty. Therefore, under the facts and circumstances of this case, the trial court did not err in denying defendant's motion to continue.

¶ 30 II. Counsel of Defendant's Choice

¶ 31 Defendant argues that he was denied counsel of his choice when he was prevented from addressing the court on the day of trial. He contends that he wanted to inform the court that he was dissatisfied with his attorney's representation because counsel had not filed any pretrial motions, investigated the case, interviewed witnesses, or subpoenaed witnesses, and counsel was not prepared for trial. Defendant's argument is clearly refuted by the record.

¶ 32 We acknowledge that a defendant has the right to be represented by retained counsel of his own choosing. See *People v. Johnson*, 75 Ill. 2d 180 (1979). However, at no point did the defendant inform the court that he desired other counsel to represent him. Although defendant's request to address the court was denied on the morning that his trial was scheduled, he was given the opportunity to specifically discuss his counsel's performance with the court in the afternoon during his guilty plea hearing. The only issue he raised concerned the inability to obtain a plea

¶ 33

of Motion to Withdraw Guilty Plea

¶ 35

¶ 36

Nonetheless, there is no indication that: (1) defendant's guilty plea was not voluntarily and intelligently made; or (2) even if counsel would have been thoroughly prepared to proceed, defendant would have gone to trial instead of pleading guilty. Defendant stated to the trial court at the guilty plea hearing, "And now we here now today as we [were] going to trial, but at the same time [I] kept on telling [my attorney] I'm not going to trial, I'm not going to trial." The

record clearly indicates that defendant did not intend to go to trial and voluntarily pled guilty.

Therefore, defendant's postconviction petition failed to state the gist of a constitutional claim of ineffective assistance of counsel.

¶ 37 For the same reasons, defendant's postconviction petition failed to state the gist of a constitutional claim based upon the trial court's denial of defendant's motion to withdraw guilty plea. Defendant claims that he was forced to plead guilty because his trial counsel was unprepared and the court denied counsel's request for a continuance. However, the record indicates that defendant understood his rights and voluntarily pled guilty. Nothing in the record indicates that the trial court abused its discretion in denying defendant's motion to withdraw guilty plea. See *People v. Pullen*, 192 Ill. 2d 36 (2000) (a trial court's ruling on a motion to withdraw guilty plea will not be disturbed absent an abuse of discretion).

¶ 38 IV. Ineffective Assistance of Appellate Counsel

¶ 39 Defendant argues that his appellate counsel was ineffective for failing to raise the issue of whether the trial court erred in (1) denying the motion to continue on the day of trial and "forcing [him] to plead guilty or go to trial where counsel was not prepared," (2) refusing to allow him to address the court at a time he would have requested new counsel, and (3) denying his motion to withdraw guilty plea.

¶ 40 Claims of ineffective assistance of appellate counsel require allegations in defendant's postconviction petition showing that appellate counsel's failure to raise an issue on direct appeal was objectively unreasonable and the decision of appellate counsel prejudiced defendant. *People v. Jones*, 362 Ill. App. 3d 31 (2005). Unless the underlying issue is meritorious, defendant suffered no prejudice from appellate counsel's failure to raise the issue on direct appeal. *Id.*

¶ 41 As discussed above, the trial court in this case did not err in failing to grant defense counsel a continuance on the day of trial, denying defendant's motion to withdraw guilty plea, or denying his request to address the court. Therefore, defendant's allegation of ineffective assistance of appellate counsel, which was based on counsel's failure to raise these issues on appeal, is without merit. Accordingly, counsel's failure to raise the issues on appeal did not prejudice defendant.

¶ 42 Therefore, we hold that defendant's postconviction allegations, liberally construed, were properly dismissed. See *Petrenko*, 237 Ill. 2d 490.

¶ 43 CONCLUSION

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

¶ 45 Affirmed.