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FIRST DIVISION
DATE: APRIL 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
PEDRO DIAZ,)
)
Defendant-Appellant.)

Appeal from the
Circuit Court of
Cook County.
No. 97 CR 25382
Honorable
Thomas P. Fecarotta, Jr.,
Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the
judgment.

ORDER

Held: Circuit court did not err in dismissing the defendant's
Post-Conviction petition.

The defendant, Pedro Diaz, appeals from the circuit court's
dismissal of his petition filed pursuant to the Post-Conviction
Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On
appeal, the defendant argues that the cause should be remanded
because (1) post-conviction counsel provided unreasonable
assistance when she argued that a *pro se* supplemental petition the

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defendant attempted to file after she had been appointed was actually a successive petition, (2) the circuit court improperly denied his motion to proceed *pro se*, (3) the circuit court improperly dismissed his claim that counsel on direct appeal provided ineffective assistance for failing to present an argument that the trial court improperly denied his request to proceed *pro se*, and (4) the circuit court improperly failed to inquire into his assertions that post-conviction counsel was not providing reasonable assistance. For the reasons that follow, we affirm the judgment of the circuit court.

The defendant was convicted of first-degree murder after he beat and kicked a woman to death. On appeal, this court rejected the defendant's arguments that the trial court erred in denying two pretrial motions to suppress incriminating statements he had made to police. See *People v. Diaz*, No. 1-01-1925 (2002) (unpublished order under Supreme Court Rule 23). In 2003, the defendant filed the current post-conviction petition; later that same year, the circuit court appointed counsel to represent the defendant in post-conviction proceedings. In 2007, after various attorneys appeared on the defendant's behalf and requested continuances, but before any attorney filed an amended post-conviction petition, the defendant submitted a *pro se* document entitled "Supplemental Petition for Post-Conviction Relief," along with a motion requesting leave to file the document. The document listed several claims of error not raised in the defendant's initial post-conviction petition.

The State argued that the defendant's submission should be stricken because the defendant was represented by an attorney, and appointed counsel responded by, *inter alia*, asking the circuit court to consider the defendant's submission as a second post-conviction petition rather than an attempt at a *pro se* filing. The circuit court indicated that it would not consider the defendant's "supplemental petition" because the defendant submitted it *pro se* while he was represented by counsel. Counsel thereafter filed a certificate pursuant to Rule 651(c) (Ill. Sup. Ct. R. 651(c), eff. Dec. 1, 1994) stating that she did not intend to amend the defendant's original post-conviction petition.

In August 2008, after counsel filed her 651(c) certificate but before the circuit court had ruled on a State motion to dismiss the defendant's petition, the defendant filed a motion to proceed *pro se*. In the motion, he asserted that appointed counsel was acting against his interests, and, as proof, he attached a copy of correspondence from counsel to him detailing the reasons she had declined to amend his post-conviction petition. At a hearing at which the defendant's motion was discussed, the circuit court engaged in the following colloquy with the defendant's post-conviction counsel:

"THE COURT: Well, the defendant does not have a constitutional right to proceed *pro se* at a postconviction[] petition.

[COUNSEL]: I agree with your Honor.

THE COURT: And I will not -- The Court's very familiar

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with [the defendant] and his case. I'm not familiar with his postconviction petition other than reading it and docketing it. However, I will not allow the defendant to proceed *pro se*. It's that simple.

[COUNSEL]: Your Honor --

THE COURT: He's not going to get trips to this courthouse and this courtroom because that's exactly what he wants. It's not going to happen."

The circuit court later granted the State's motion to dismiss the defendant's post-conviction petition, and he filed this timely appeal.

On appeal, the defendant first argues that his post-conviction counsel provided unreasonable assistance when she argued to the circuit court that his "supplemental petition" was actually a successive post-conviction petition. However, the context of counsel's argument, including the legal issues at play, belies the defendant's assertion.

The Act provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill.2d 239, 244, 757 N.E.2d 442 (2001). "To be entitled to postconviction relief, a defendant must demonstrate that he [or she] has suffered a substantial deprivation of his [or her] federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *People v. Whitfield*, 217 Ill.2d 177, 183, 840 N.E.2d 658 (2005). "Under the Act, a post-conviction proceeding not involving the death penalty

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contains three stages." *Edwards*, 197 Ill.2d at 244, 757 N.E.2d 442. A petition will survive the first stage if it states the gist of a constitutional claim (*People v. Gaultney*, 174 Ill.2d 410, 418, 675 N.E.2d 102 (1996)) or if the trial court fails to make a finding that it is frivolous within 90 days, as required under section 122-2.1 of the Act (*People v. Vasquez*, 307 Ill.App.3d 670, 672-73, 718 N.E.2d 356 (1999); 725 ILCS 5/122-2.1 (West 2008)). According to the parties, the circuit court advanced the defendant's petition here to the second stage of proceedings under the Act.

At the second stage of post-conviction proceedings, the defendant may be appointed counsel. *People v. Greer*, 212 Ill.2d 192, 203-04, 817 N.E.2d 511 (2004). At the second stage, defendant's counsel may file an amended post-conviction petition and the State may file a motion to dismiss or an answer to the petition. *Gaultney*, 174 Ill.2d at 418, 675 N.E.2d 102 (citing 725 ILCS 5/122-5 (West 1992)). If the trial court does not dismiss or deny the petition, the proceeding advances to the third and final stage, at which the trial court conducts an evidentiary hearing on the defendant's petition. *Gaultney*, 174 Ill.2d at 418, 675 N.E.2d 102. The petition here was dismissed at the second stage.

The parties represent that, after post-conviction counsel was appointed, the defendant filed a *pro se* document seeking to supplement his original post-conviction petition. As the circuit court explained, however, a defendant who is represented by counsel has no authority to file *pro se* materials, unless those materials

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challenge counsel's effectiveness. See *People v. Rucker*, 346 Ill. App. 3d 873, 882 (2004). Thus, if the defendant's *pro se* submission was actually a supplemental petition submitted to the court while his counsel was appointed, it was not properly filed and could not have been considered. Appointed counsel's position--that the document should have been considered as a new post-conviction petition--was an attempt to circumvent this obvious bar to the defendant's filing, so that the defendant could present his claims. Because counsel attempted to characterize the defendant's submission in the only way that would have allowed its presentation to the court, we can hardly say that counsel's approach was unreasonable.

Notwithstanding this point, the defendant asserts that his counsel provided unreasonable assistance because her argument relegated his supplemental complaints to a successive post-conviction petition, which would face procedural hurdles inapplicable to the initial petition now at issue. See *e.g.*, *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26 (2000) (detailing procedural obstacles for successive post-conviction petitions). According to the defendant, counsel should have instead incorporated his supplemental arguments into the amended petition she was allowed to file on his behalf. However, as the State observes in its brief, in order to provide the requisite reasonable representation, post-conviction counsel need investigate only the claims a defendant raises in his initial post-conviction pleading; counsel has no duty to explore additional claims. *People*

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v. Davis, 156 Ill. 2d 149, 163-64, 619 N.E.2d 750 (1993). Because any supplemental claims contained in the defendant's *pro se* submission were not included in his original petition, counsel had no duty to consider them. We therefore reject the defendant's argument that post-conviction counsel somehow provided substandard representation due to her treatment of the defendant's "supplemental petition."

The defendant next argues that the circuit court erred in denying his request to proceed *pro se* after appointed counsel declined to amend his original post-conviction petition. The defendant, however, bases his argument on the notion that appointed counsel had provided unreasonable assistance by failing to include his supplemental complaints in an amended petition. Because we reject that notion above, we must also reject the defendant's second argument based on it.

Further, we see no independent reason to overturn the circuit court's decision to deny the defendant's motion to proceed *pro se*. Even a criminal defendant, who, as the circuit court noted, has a much stronger constitutional right to self-representation than a post-conviction petitioner (*cf.*, *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009) (liberty interests and constitutional protections are weaker for petitioners in post-conviction proceedings than for criminal defendants)), may be denied that right in certain instances, such as when the defendant engages in obstructionist conduct or cannot knowingly waive counsel (*eg.*, *People v. Rohlf*s, 368 Ill. App. 3d 540, 544-45,

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858 N.E.2d 616 (2006)). Again even for a criminal defendant, a trial court's decision on the matter will not be disturbed on appeal unless the trial court abused its discretion. *Rohlfis*, 368 Ill. App. 3d at 545.

Instead of challenging the circuit court's application of discretion, the defendant now contends that the circuit court labored under a misapprehension that defendants are prohibited from representing themselves in post-conviction proceedings. However, we see no support in the record for the defendant's contention. In denying the defendant's motion to proceed *pro se*, the circuit court stated that the defendant had no "constitutional right" to appear *pro se* in post-conviction proceedings, and it went on to deny the defendant's request based on its evaluation of the status of the case. We thus reject the defendant's contention that the circuit court committed a legal error in denying the defendant's request to proceed *pro se*. Because the defendant offers nothing more to establish that the circuit court abused its discretion in denying his request, we reject his argument that the circuit court's decision constituted reversible error.

For the same reasons, we reject the defendant's third argument, that the circuit court should have initiated an inquiry into the reasonableness of the representation provided by post-conviction counsel after the defendant informed the court of counsel's failure to present his supplemental claims of error. Again, counsel's decision not to incorporate his supplemental claims into an amended petition, and her attempt to have the court

consider his supplemental claims as a successive petition, did not constitute unreasonable assistance.

The defendant's final argument on appeal is that the trial court erred in dismissing his post-conviction petition, because it included a meritorious claim that he received ineffective assistance of counsel on direct appeal. The defendant argues that appellate counsel inexplicably forwent a potentially viable argument challenging the trial court's denial of the defendant's motion to proceed *pro se* at trial.

In considering a motion to dismiss a post-conviction petition at the second stage of proceedings under the Act, the circuit court must take as true all of the petition's well-pled facts and may grant the motion only if the petition fails to allege a substantial deprivation of constitutional rights. *People v. Garcia*, 405 Ill. App. 3d 608, 614-15, 939 N.E.2d 972 (2010). We review *de novo* a circuit court's second-stage dismissal of a post-conviction petition. *People v. Edwards*, 195 Ill. 2d 142, 156, 745 N.E.2d 1212 (2001).

Allegations of ineffective assistance of appellate counsel are resolved under the same standard that governs the performance of trial counsel. *People v. West*, 187 Ill.2d 418, 435, 719 N.E.2d 664 (1999). "Thus, a defendant who alleges that appellate counsel was ineffective must establish both a deficiency in counsel's performance and prejudice resulting from the asserted deficiency." *Edwards*, 195 Ill. 2d at 163; see also *Strickland v. Washington*, 466 U.S. 668 (1984). "Appellate counsel is not required to brief every

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conceivable issue on appeal, however, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *Edwards*, 195 Ill. 2d at 163. "For these reasons, unless the underlying issue is meritorious, a defendant cannot be said to have incurred any prejudice from counsel's failure to raise the particular issue on appeal." *Edwards*, 195 Ill. 2d at 163.

To determine if the defendant can establish both prongs of the *Strickland* test, we must review the relevant proceedings from the defendant's original trial. In August 1999, the defendant filed a *pro se* motion asking that he be appointed counsel other than the public defender. In a November 1999 pretrial hearing, after hearing the defendant's concerns with counsel's performance and discussing them with him at length, Judge Hoffenberg told the defendant that he was not inclined to appoint new counsel. The following conversation ensued:

"[THE DEFENDANT]: *** I will do the best I can *pro se*, if I have to, but I am not going to proceed with the Public Defender's Office.

THE COURT: Mr. Diaz, as a matter of law, you may very well have a right to defend yourself under the death penalty case. There is no chance in the entire world I will allow you to defend yourself under the death penalty case. There is zero chance that's happening.

I don't care if the Supreme Court says he waived his right, and I'm going to let him. I'm not letting you. And

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let the Supreme Court tell me that I'm wrong. There is not one chance in this world, as long as I am sitting in this courtroom, that you will defend yourself. And I tell you if the Supreme Court eventually *** says I am wrong, more power to them. You are not defending yourself in this court in a death penalty case, period.

If you want to make motions yourself, I will consider your motions. You can file whatever motions you want on your own. *** But I am not letting you defend yourself."

At an April 2000 hearing before a different judge, Judge Urso, the defendant's counsel referred to the defendant's prior challenge to his attorney's representation, as well as Judge Hoffenberg's ruling that the defendant could file *pro se* motions while represented by counsel, and the following exchange occurred:

"[THE COURT]: Mr. Diaz, I don't care what Judge Hoffenberg did, you will be either represented by an attorney or, if you wish, to represent yourself without an attorney. It's not going to be both ways. Do you wish the attorney to stay on the case or not?

THE DEFENDANT: I don't want to be represented by the Public Defender's Office.

THE COURT: Can you afford to hire your own lawyer?

THE DEFENDANT: No.

THE COURT: Okay. Then, the Public Defender will be appointed to represent you. If you wish to represent yourself, I will consider that.

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THE DEFENDANT: I'm considering that.

THE COURT: All right."

Judge Urso then elicited information about the nature of the case before continuing the conversation with the defendant:

"THE COURT: Do you understand that if you elect to represent yourself, the death penalty, when you're found guilty, could be imposed? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So you still wish to represent yourself?

THE DEFENDANT: I said I'm still considering it.

THE COURT: Well, you have to decide. It's going to be put over to another date, and you make that decision. There will not be a dual representation in this case. It was wrong for Judge Hoffenberg to allow that. So, you must decide. If you want to represent yourself, then you will represent yourself on everything, or if you want the Public Defender, but I will give you the opportunity to decide. Okay?

THE DEFENDANT: I'm still considering it."

Although Judge Hoffenberg later issued a motion-to-suppress ruling based on an evidentiary hearing over which he had earlier presided, the defendant's case thereafter proceeded before a third judge, Judge Fecarotta. When Judge Fecarotta began overseeing the case, the defendant's counsel informed him, in the defendant's presence, that "Judge Urso [ruled] that [the defendant] shouldn't be filing any motions, that he should either proceed *pro se* or [counsel] should be the one to direct the defense of the case." The

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prosecutor responded by asking Judge Fecarotta to inquire as to whether the defendant wished to represent himself. Judge Fecarotta answered that he did not "believe at this point that there[] [was] a request by [the defendant] to represent himself." The issue of the defendant's representation was not raised again until after the defendant's trial.

From this record, we conclude that, even if the defendant's counsel on direct appeal should have raised the *pro se* representation argument the defendant now asserts, the omission caused the defendant no prejudice, because the argument would not have succeeded. The defendant is correct when he asserts in his briefs that a criminal defendant has a constitutional right to refuse State-provided counsel and proceed without representation if he voluntarily and intelligently elects to do so, even in a capital case. *Eg., People v. Coleman*, 168 Ill. 2d 509, 544, 660 N.E.2d 919 (1996) (citing *Faretta v. California*, 422 U.S. 806 (1975) and *Silagy v Peters*, 905 F.2d 986, 1007 (7th Cir. 1990)). Thus, the defendant is also correct when he argues that Judge Hoffenberg erred in stating that the capital nature of the prosecution would have been grounds for denying him the opportunity to represent himself. However, the record indicates that Judge Hoffenberg's ruling did not stand. Upon learning of Judge Hoffenberg's ruling, Judge Urso immediately departed from it and informed the defendant that he had every right to proceed *pro se*. To the extent Judge Hoffenberg's ruling might have deterred the defendant from making that request when he otherwise would have, Judge Urso's careful

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explanation, accompanied by an explicit invitation to defendant to file a request, remedied the problem, as evidenced by the defendant's telling Judge Urso that he would "consider" asking to proceed *pro se*. Thereafter, even in the face of Judge Fecarotta's stating in the defendant's presence that there was no pending motion for the defendant to proceed *pro se*, the defendant made no attempt to exercise his right to self-representation.

This record, then, demonstrates that the defendant did not ask to represent himself at trial, but effectively declined a judge's invitation to do so. Because the defendant declined to make a request to proceed *pro se*, his appellate counsel could not have successfully argued on direct appeal that the trial court erred in denying such a request. The defendant therefore suffered no prejudice from his appellate counsel's failure to raise the issue, and the circuit court here did not err in dismissing the defendant's post-conviction petition arguing ineffectiveness of appellate counsel.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.