

No. 1-09-0416

**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).

SECOND DIVISION  
JANUARY 11, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 21395
	)	
EUGENE WARD,	)	Honorable
	)	Bertina Lampkin,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Karnezis concurred  
in the judgment.

O R D E R

**HELD:** Circuit court was not obligated to conduct an inquiry into defendant's *pro se* claim of unreasonable assistance of post-conviction counsel; circuit court's granting of State's motion to dismiss affirmed.

Defendant Eugene Ward appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act),

725 ILCS 5/122-1 *et seq.* (West 2006). Defendant does not raise any substantive issue regarding the second-stage dismissal of his post-conviction petition. Instead, he contends that the court erred by ignoring his *pro se* motion alleging that post-conviction counsel provided him unreasonable assistance with his petition, and requests that his cause be remanded to the circuit court for an inquiry into the factual basis for his claim.

The record shows that defendant was sentenced to 25 years' imprisonment on his 2004 bench conviction for first degree murder. This court affirmed that judgment on direct appeal. *People v. Ward*, No. 1-04-1297 (2006) (unpublished order under Supreme Court Rule 23).

On December 27, 2006, defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial and appellate counsel for, *inter alia*, failing to challenge a violation of his rights under *Gerstein v. Pugh*, 420 U.S. 103 (1975), and the denial of his fourth, fifth, sixth and fourteenth amendment rights under the United States Constitution (U.S. Const., amends. IV, V, VI, and XIV).

The circuit court subsequently appointed counsel to represent defendant, and on June 19, 2008, counsel filed a supplemental post-conviction petition incorporating the issues in defendant's *pro se* petition. Counsel also elaborated on defendant's *Gerstein* allegation claiming that trial counsel was

ineffective for failing to argue that the *Gerstein* violation led to defendant's involuntary statement, and that appellate counsel was ineffective for failing to raise this ineffective assistance claim on appeal.

Counsel also filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that she communicated with defendant by telephone and letter to ascertain his contentions of the deprivation of his constitutional rights, and examined the court file, the trial proceedings, and defendant's *pro se* petition. She also stated that she deemed it necessary to file a supplemental petition to adequately present defendant's contentions.

On August 21, 2008, defendant filed a *pro se* motion for appointment of counsel other than the public defender, alleging that he would be prejudiced by representation from that office in this cause. In support of his claim of inadequate representation by his current post-conviction counsel, defendant alleged that counsel refused to contact any witnesses pertaining to his case and told him that they were against him. Defendant also alleged that he told counsel that his trial attorney had an affidavit from the only eyewitness, and that he had asked counsel to obtain the paperwork pertaining to this eyewitness' complaint of police harassment from his trial attorney, but that counsel refused to do so. Defendant further alleged that when he asked counsel to

argue that his fourth, fifth, sixth and fourteenth amendment rights were violated, she responded that she would have to discuss the case with her supervisor, and that she refused to argue that trial counsel was ineffective. Defendant concluded by alleging that his rights have been or will continue to be substantially harmed and prejudiced by the representation "by the State Public Defender, or resulting in an absolute conflict of interest."

According to a "notification of motion" form which is in the common law record, but not signed or file stamped, defendant's motion was to be heard on September 23, 2008. The motion, however, was not noted as filed on the half-sheet, or mentioned on September 23, 2008, when the State informed the court that defendant's post-conviction case was slated for its response. The State then filed its motion to dismiss defendant's *pro se* and supplemental post-conviction petitions. The matter was then continued several times and set for oral arguments on January 6, 2009, when, after taking the matter under advisement, the circuit court granted the State's motion to dismiss.

On appeal, defendant solely claims that the court erred in failing to conduct an inquiry into the allegations of his *pro se* motion in which he requested new counsel based on his contention that post-conviction counsel provided him with inadequate representation. As a result, defendant requests that his cause

be remanded to the circuit court for an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We review this issue *de novo*. *People v. Sims*, 192 Ill. 2d 592, 615 (2000).

We initially observe that defendant has not claimed that post-conviction counsel provided him an unreasonable level of assistance (*People v. Hardin*, 217 Ill. 2d 289, 305 (2005)), and that issue may not be addressed *sua sponte* (*People v. Givens*, 237 Ill. 2d 311, 323-24 (2010)). We further observe that defendant has acknowledged the absence of legal precedent to support his argument, but maintains that his situation is analogous to *Krankel* and that the reasoning employed there should be applied to this case.

In *Krankel*, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of counsel, and was denied new counsel to assist him with the motion. *Krankel*, 102 Ill. 2d at 187-88. The supreme court agreed with the parties that new counsel should have been appointed to represent defendant on his *pro se* motion, and remanded the cause for a hearing on defendant's motion with appointment of new counsel. *Krankel*, 102 Ill. 2d at 189. Subsequently, in *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003), the supreme court held that if a defendant presents a *pro se* "post-trial" claim of ineffective assistance of counsel, the trial court should first look at the factual basis of the claim, and if it determines that the claim lacks merit or

pertains only to matters of trial strategy, it need not appoint new counsel and may deny the motion.

The supreme court recently revisited this issue in *People v. Jocko*, No. 108465, slip op. at 3 (Ill. S. Nov. 18, 2010). In that case, defendant alleged that the circuit court should have conducted a *Krankel* inquiry into his *pro se*, pre-trial claim of ineffective assistance of counsel. The supreme court observed that under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel must show a reasonable probability that but for counsel's unprofessional errors, the outcome of the proceeding would have been different, and explained that the fundamental problem with addressing such a claim prior to trial is that there is not yet an outcome. *Jocko*, slip op. at 4-5. Accordingly, the supreme court held that the circuit court is not obligated to address a *pro se* claim of ineffective assistance of trial counsel prior to trial as there is no way to determine if counsel's errors have affected an outcome that has not yet occurred. *Jocko*, slip op. at 5.

In a post-conviction case, as here, there is no sixth amendment right to counsel, but the Act provides for a reasonable level of assistance to post-conviction defendants. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To that end, Rule 651(c) imposes specific duties on post-conviction counsel (*People v. Richmond*, 188 Ill. 2d 376, 380-81 (1999)), the purpose of which

is to ensure that defendants are provided proper representation when presenting their claims of constitutional deprivation to the court under the Act (*Suarez*, 224 Ill. 2d at 42, 46-47; *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008)). This situation is analogous to that found in *Jocko*, in that the circuit court cannot analyze whether counsel's assistance was reasonable prior to the conclusion of the post-conviction proceedings since counsel has not yet completed the presentation of defendant's claims to the court. *Jocko*, slip op. at 4-5. We observe that many times, post-conviction counsel presents argument up until the court takes the matter under advisement, which was the case here. Accordingly, we find that the circuit court was not obligated to investigate defendant's *pro se* allegation that post-conviction counsel provided him with an unreasonable level of assistance where the allegation was made prior to the conclusion of the proceeding on his post-conviction petition. *Jocko*, slip op. at 4-5.

In addition, we note that in this case, as in *Jocko*, the *pro se* motion alleging unreasonable assistance of post-conviction counsel was filed, but it appears from the record that neither the court, counsel nor the State were aware of it as no mention was made of it at any point in the proceedings. *Jocko*, slip op. at 2, 5-6. Accordingly, we may not criticize the circuit court for failing to take action on defendant's motion where there is

no indication that it was ever presented with it. *Jocko*, slip op. at 6.

Defendant, however, claims that *Hardin*, 217 Ill. 2d 289, supports his contention that an inquiry should have been conducted. We disagree. In *Hardin*, prior to the proceeding on defendant's post-conviction petition, defendant wrote the court a letter requesting appointment of counsel outside the public defender's office based on his contention that his post-conviction public defender had a conflict of interest with his trial public defender. *Hardin*, 217 Ill. 2d at 297. The supreme court held that the circuit court's duty to investigate, at an early stage in post-conviction proceedings, *arises only* if defendant *presents facts* suggesting a *conflict* that goes beyond one public defender having to attack another. (Emphases added.) *Hardin*, 217 Ill. 2d at 302-03. Here, however, this claim was included as part of a boiler plate motion, and defendant did not present any facts suggesting such a conflict.

In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

Affirmed.