

the defendant was under the influence of psychotropic medications. He further alleged that his attorney told him to waive a jury trial solely for his attorney's convenience. The defendant argued that his attorney was ill-prepared at trial, smelled as though he had been drinking, and maintained an excessive caseload. The defendant finally argued that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness and the jury trial waiver issue. On May 22, 2008, the trial court conducted an evidentiary hearing on the second amended postconviction petition. The matter was taken under advisement.

On February 17, 2009, the defendant filed *pro se* motions, one requesting a substitution of counsel and the other requesting a substitution of judge for cause. He brought his motion for substitution of judge under section 114-5(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(d) (West 2008)) and Illinois Supreme Court Rule 63(C)(1) (eff. Apr. 16, 2007). In his motion for substitution of judge, the defendant stated that on February 9, 2009, he received documented information that Judge Hackett, in an Illinois Attorney Registration and Disciplinary Commission (ARDC) hearing, testified by deposition that the defendant's trial attorney, Thomas Hildebrand, Jr., had a reputation for being truthful.¹ He further argued that the majority of complaints in his postconviction petition were related to the ineffectiveness of Thomas Hildebrand, Jr. The defendant argued that Judge Hackett was biased in favor of Thomas Hildebrand, Jr., and against the defendant.

On February 23, 2009, Judge Hackett entered an order denying the defendant's second amended postconviction petition. He found that the evidence did not support the defendant's contention that he was on psychotropic drugs at the trial. The court found that the allegations of alcohol breath were not substantiated or noted by the trial court. It further held that a heavy caseload was suggested by the defendant but not demonstrated. It found that the jury

¹On April 7, 2005, the ARDC recommended that Thomas Hildebrand be suspended from the practice of law for one year and until further notice of the court.

waiver was validly and knowingly made by the defendant after he was addressed by the court. The court stated, "Even had these allegations of defendant been more substantially supported, they still would not include any demonstration that the outcome of the trial would have been any different had defendant been represented by another attorney without these claimed factors present." The court found that the defendant's appellate counsel presented appropriate and reasonable issues for appellate consideration and that he was not ineffective. The trial court denied his postconviction petition, finding that the defendant failed to make a showing that his constitutional rights were violated either at the trial or in the appellate proceedings.

On February 24, 2009, the court entered an order stating that it had on that date been presented with the defendant's motion for substitution of counsel and motion for substitution of judge. The court noted that on February 23, 2009, it entered an order ending the court's involvement in the matter. The motions were set for hearing on March 11, 2009. On March 6, 2009, the defendant filed a notice of appeal, appealing the denial of his petition for postconviction relief. Following a hearing, on March 11, 2009, the trial court entered an order discharging the defendant's counsel. Judge Hackett wrote the following:

"Explanation is made to defendant that no appeal has been filed, the court is willing to direct the clerk to file a notice of appeal for him. The court has only brought defendant to court to clarify this and protect his appellate interests. [The defendant] insists that the court cannot proceed because he has filed a motion for substitution of judge. He re-affirms that he does not want his attorney or the court to proceed on a notice of appeal."

The case was referred to Judge Romani to hear the defendant's motion for substitution of judge.

On March 13, 2009, Judge Romani entered an order on the defendant's motion for

substitution of judge for cause. He stated that after reviewing the record, he found that the defendant filed a notice of appeal on March 6, 2009, that an appellate defender was appointed, and that all the documents were sent to the appellate court and the appellate defender. The court found that it did not have any jurisdiction to proceed in the matter and that there was nothing pending in the court from which the defendant could request a change of judge.

On March 20, 2009, the defendant filed another *pro se* motion for substitution of judge. He alleged, "[Both Judge Romani and Judge Hackett] will continue to hide [my attorney's] improprieties concerning my case." He alleged that dates on the notice of appeal were tampered with and that Judge Romani was a willing and knowing participant in Judge Hackett's negligence. He alleged that there was a widespread conspiracy to protect Thomas Hildebrand and that he had "no real chance of being treated fairly by Judge Romani."

On March 31, 2009, Judge Romani entered an order stating that the defendant filed a *pro se* notice of appeal on February 28, 2009, which was filed by the clerk on March 6, 2009. An appellate defender was appointed and the defendant was notified on March 13, 2009, by the court that there was nothing pending in the circuit court of Madison County. The court indicated that the defendant's correspondence was noted and placed in the court file. The court held, "[T]here is nothing pending in the circuit court to have a change of judge from, and furthermore, this court lacks jurisdiction since this cause is on appeal."

On April 2, 2009, the defendant filed a petition for relief from judgment. He alleged that Judge Hackett denied his petition for postconviction relief because evidence was uncovered that proved the judge gave sworn, voluntary testimony in a disciplinary hearing against the defendant's trial attorney regarding the attorney's character. The defendant alleged that Judge Hackett acted in a retaliatory fashion by denying his motion for substitution of judge for cause. The defendant asked the court to vacate the court's order

denying his postconviction petition. On April 9, 2009, Judge Hackett entered an order acknowledging that the defendant had filed a petition for relief from judgment, noting that the defendant had previously filed a motion for substitution of judge, and referring the file to Judge Romani. There is nothing in the record evidencing that this petition was ruled on.

On April 9, 2009, the defendant filed a *pro se* motion for leave to file a successive petition for postconviction relief. The defendant alleged that his constitutional rights were violated because his trial attorney and the State entered an inadmissible alleged confession. He asserted that had the alleged confession been brought before a jury, "it would have clearly resulted in an immediate mistrial." He argued that the admission of this alleged confession caused him serious prejudice. Additionally, he argued that he has been "wilfully and knowingly denied the effective assistance of counsel during [his] bench trial, appeal, and post-conviction hearing in order to cover up the misconduct of Judge Hackett, Neil Schroeder, and Thomas E. Hildebrand, Jr." He asserted that this misconduct reduced his bench trial to a "judicial sham." He further alleged that his trial attorney was operating under a conflict of interest by representing him and a witness. He asserted that his postconviction attorney and Judge Hackett covered this up. He stated, "Because of the serious nature of the constitutional violations and the misconduct of the attorney and judge involved, I verily pray this conviction be vacated and this case be dismissed with prejudice."

On April 28, 2009, Judge Romani entered an order denying leave to file a successive postconviction petition on the ground that the defendant failed to demonstrate that fundamental fairness required a relaxation of the waiver rule in order to consider the claims in his successive postconviction petition. The court held that the defendant failed to demonstrate any prejudice that inured from the failure to assert his claims earlier. It went on to state that even had the claims been presented, there was scant probability that the defendant would have prevailed. The court found that the defendant made no showing that

the claims presented in the successive postconviction petition so infected the trial that his resulting conviction violated due process. On May 14, 2009, the defendant filed a notice of appeal from the denial of his "leave to appeal for second subsequent postconviction."

On May 14, 2009, the defendant filed a *pro se* petition for relief from judgment requesting that the court set aside the adverse judgment in his petition for leave to file a successive postconviction petition. The defendant argued that Judge Romani abused his authority by ignoring his motion for substitution of judge and that his failure to rule on the motion resulted in Judge Romani's order denying the defendant's motion for leave to file a successive postconviction petition being null and void. The defendant alleged that Judge Romani was biased against him, that this bias was evidenced by his failure to hold hearings on the motion for substitution of judge and the petition for leave to file a successive postconviction petition, and that as a result of this bias, Judge Romani denied his petition for leave to file a successive postconviction petition.

On May 22, 2009, after reviewing the pleadings, Judge Romani filed an order dismissing the defendant's petition for relief from judgment on the ground that it was not the proper method to attack a denial of the defendant's motion for leave to file a successive postconviction petition.

On June 8, 2009, the defendant filed a notice of appeal from the denial of his motion for relief from judgment. On August 19, 2009, the appellate court consolidated the defendant's appeal from the denial of postconviction petition, his appeal from the denial of leave to file a successive postconviction petition, and his appeal from the denial of his petition for relief from judgment.

On May 3, 2010, the State filed a motion to dismiss the defendant's appeal for a want of appellate jurisdiction. The State argued that the defendant's notices of appeal identified the appeals as from the denial of his petition for postconviction relief, from the denial of his

motion for leave to file a successive postconviction petition, and from the denial of his petition for relief from judgment. The State argued that the appellate court acquired no jurisdiction to review the defendant's argument on appeal because it is limited solely to the issue of whether the trial court should have granted his motion for substitution of judge, not any of the denials of his petitions as identified in the notices of appeal. Additionally, the State argued that the defendant filed his motion for substitution of judge for cause pursuant to section 114-5(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(d) (West 2008)), that section 114-5(d) does not apply in postconviction proceedings, and that, therefore, the motion is a nullity. The State argued that, given that the defendant raised no issue except the court's failure to rule on the motion for substitution of judge and the motion for substitution was itself a nullity, there is no order before this court to review.

On May 17, 2010, the defendant filed a response to the State's motion to dismiss. He argued that, even though the notices of appeal did not specifically list the motion for substitution of judge for cause as an issue, it was a step in the procedural process leading to the judgment denying the postconviction petition. The State's motion to dismiss and the defendant's response were taken with the case.

ANALYSIS

On appeal, the defendant's sole argument is that the trial court erred in failing to first rule on the defendant's motion to substitute judge prior to issuing any substantive rulings on his postconviction petition, his motion for leave to file a successive postconviction petition, and his petition for relief from judgment.

Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in

the notice. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). "The purpose of a notice of appeal is to inform the prevailing party in the trial court that the other party seeks review of the judgment." *Smith*, 228 Ill. 2d at 104. It is generally accepted that a notice of appeal should be construed liberally. *Smith*, 228 Ill. 2d at 104. A notice of appeal should be considered as a whole and will confer jurisdiction on an appellate court if it fairly and adequately sets out the judgment complained of and the relief sought so that the successful litigant is advised of the nature of the appeal. *Smith*, 228 Ill. 2d at 105. "When a notice of appeal is perfected the trial court loses jurisdiction as to the judgment or part thereof from which the appeal is taken and, as to such matter, the case thereafter proceeds in the appellate court not as a new case but as a continuation of the case in the trial court." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979).

A judgment that is not specified in the notice of appeal may be reviewed when it is "a step in the procedural progression leading" to the judgment specified in the notice of appeal. *McGill v. Garza*, 378 Ill. App. 3d 73, 75 (2007). If it is a step in the procedural progression, a nonspecified judgment may be reviewed because it can be said to relate back to the judgment specified in the notice of appeal. *McGill*, 378 Ill. App. 3d at 75. "If from the notice of appeal itself and the subsequent proceedings it appears that the appeal was intended, and the appellant and the appellee so understood, to have been taken from an unspecified judgment or part thereof, the notice of appeal may be construed as bringing up for review the unspecified part of the order or judgment. Such a construction would be appropriate where the specified order directly relates back to the judgment or order sought to be reviewed." *Burtell*, 76 Ill. 2d at 434.

The defendant's notices of appeal challenge the denial of his postconviction petition, the denial of his motion for leave to file a successive postconviction petition, and the denial of his petition for relief from judgment. The defendant argues that, while his notices of

appeal do not specifically list the motion for substitution of judge for cause, this court has jurisdiction because the review of a motion for substitution of judge is a step in the procedural progression leading to the judgments specified in the notices of appeal.

The defendant cites *In re A.N.*, 324 Ill. App. 3d 510 (2001), in support of his procedural progression argument. In that case, the State filed a petition to adjudicate A.N. a ward of the court, which the court granted. Two days later, the court allowed the State's motion for a social history and psychiatric examination of A.N. Seven days after the State filed its petition to adjudicate A.N. a ward of the court, the State filed a motion for automatic substitution of judge. The next day, the trial court denied the motion to substitute judge on the basis that it had made a substantive ruling, but it did not specify which ruling. The State then filed a motion for discretionary transfer of jurisdiction from the juvenile court for trial as an adult. The motion to transfer was denied and the State appealed. The appellate court found that it could review the trial court's ruling on the State's motion to substitute judge because "an erroneous refusal of a proper request for substitution of judge bears directly upon the question of whether the trial court's order on appeal, the State's transfer motion in this case, was proper." *In re A.N.*, 324 Ill. App. 3d at 512. The court further found that it had "jurisdiction to review the trial court's ruling on the State's motion to substitute judge even though the State failed to specify it in the State's notice of appeal because it is a step in the procedural progression leading to the specified judgment." *In re A.N.*, 324 Ill. App. 3d at 512. "Had the State's motion to substitute judge been granted, the trial judge would not have been in a position to exercise his discretion in ruling on the State's motion to transfer jurisdiction." *In re A.N.*, 324 Ill. App. 3d at 512.

In the instant case, the defendant's *pro se* motion for substitution of judge for cause was file-stamped on February 17, 2009. The docket entry for February 17, 2009, states, "Motion for substitution of counsel and motion for substitution of judge for cause filed pro

se." To docket a pleading means that the cause is entered on the court's official docket for further proceedings. *People v. Brooks*, 221 Ill. 2d 381, 391 (2006). It does not require that the cause be placed on a specific call of a judge authorized to rule on it. *Brooks*, 221 Ill. 2d at 391. While Judge Hackett did not receive the defendant's *pro se* motion for substitution of counsel prior to ruling on his postconviction petition, it had been filed and docketed prior to his ruling. Thus, the motion was pending when Judge Hackett ruled on the postconviction petition.

When an order has the possibility of rendering all the subsequent orders void, the order is a step in the procedural progression leading to the order specified in the notice of appeal. *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 372 (2009). Had the defendant's motion for substitution of judge been improperly denied, Judge Hackett's denial of the defendant's postconviction petition would be void. Had it been granted, Judge Hackett would not have been in the position to exercise his discretion on the defendant's postconviction petition. This court has jurisdiction to review the failure to rule on the defendant's motion for substitution of judge prior to ruling on the defendant's postconviction petition because it relates back to the denial of the defendant's postconviction petition specified in the notice of appeal.

The defendant's first *pro se* motion for substitution of judge was filed when he was still represented by an attorney. A defendant who is represented by an attorney generally has no authority to file *pro se* motions. *People v. Rucker*, 346 Ill. App. 3d 873, 882 (2003). There is an exception to this rule that allows defendants to raise *pro se* claims of ineffective assistance of counsel. *Rucker*, 346 Ill. App. 3d at 883.

In the instant case, the defendant filed separate *pro se* motions for substitution of counsel and for substitution of judge on the same day. The motion for substitution of counsel alleged that, as a public defender, his postconviction attorney knew that Judge Hackett gave

sworn deposition testimony in an ARDC hearing regarding Thomas Hildebrand, Jr.'s reputation for being truthful and therefore knew of Judge Hackett's alleged bias in favor of Thomas Hildebrand, Jr. The defendant asserted that his counsel failed to fulfill his duty as appointed counsel by failing to file a motion for substitution of judge. In his motion for substitution of judge, the defendant asserted that in an ARDC hearing, Judge Hackett gave sworn testimony that Thomas Hildebrand, Jr., had a reputation for being truthful and that, therefore, he was biased against the defendant with respect to his postconviction petition which alleged ineffectiveness of trial counsel. The defendant's *pro se* motion for substitution of counsel falls under the exception to the rule prohibiting defendants who are represented by counsel from filing *pro se* motions, because it was a claim of ineffective assistance of counsel. His *pro se* motion for substitution of judge falls under the same exception. In his *pro se* motion for substitution of counsel, the defendant asserted that his postconviction counsel was ineffective for failing to file a motion for substitution of judge. Given this alleged failure, the only way the defendant could present his motion for substitution of judge was to file it *pro se*.

The State argues that the defendant's motion for substitution of judge is a nullity because it was filed pursuant to section 114-5(d) of the Code of Civil Procedure (725 ILCS 5/114-5(d) (West 2008)). The defendant filed a motion for substitution of judge pursuant to both section 114-5(d) and Supreme Court Rule 63(C)(1). Section 114-5(d) does not apply in postconviction proceedings. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). Rule 63(C)(1) delineates instances when a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Ill. Ct. R. 63(C)(1) (eff. Apr. 16, 2007). "In certain limited circumstances where there may be an appearance of prejudice, a judge must recuse himself from postconviction proceedings." *Harvey*, 379 Ill. App. 3d at 522. The defendant has alleged that those circumstances are

present in this case.

In *People v. Harvey*, 379 Ill. App. 3d 518 (2008), the defendant filed a *pro se* postconviction petition and a motion for substitution of judge pursuant to section 114-5. The trial judge heard the postconviction petition and dismissed it as frivolous and without merit. The trial court did not rule on the motion for substitution of judge. The defendant argued that the trial court's failure to rule on the substitution motion was a violation of section 114-5(d) and that, because the judge should not have proceeded further until the substitution motion was ruled on, any orders entered while the motion was pending were void. The appellate court found that section 114-5(d) does not apply in postconviction proceedings and that, therefore, the defendant had no absolute right to a substitution of judge. *Harvey*, 379 Ill. App. 3d at 522. The court found that the defendant did not make any allegations that the judge was required to recuse himself pursuant to Supreme Court Rule 63(C)(1), and the court did not find those circumstances present. *Harvey*, 379 Ill. App. 3d at 522. The court found that the judge was not required to recuse himself and that there was no indication that he should have recused himself from the postconviction proceedings, and therefore, his ruling on the postconviction petition was made with full authority. *Harvey*, 379 Ill. App. 3d at 523.

In the instant case, the defendant's motion for substitution of judge was filed and docketed prior to Judge Hackett ruling on the defendant's postconviction petition. In his *pro se* motion for substitution of judge, the defendant alleged that it was not until February 9, 2009, that he received documentation about Judge Hackett that led to him file the motion for substitution of judge. In the motion, the defendant alleged that Judge Hackett should recuse himself pursuant to Supreme Court Rule 63(C)(1). No actions were taken to determine whether Judge Hackett's impartiality might reasonably be questioned based on his potential personal bias concerning the defendant's trial attorney. Judge Hackett ruled on the defendant's postconviction petition. The defendant then filed a notice of appeal from the

denial of his postconviction petition. Judge Romani ruled that the court lacked jurisdiction to consider the motion to substitute judge because a notice of appeal had been filed. All further petitions filed by the defendant alleged that Judge Hackett and Judge Romani were biased in favor of his trial attorney, Thomas Hildebrand, Jr., and that the bias prevented the judges from considering the ineffectiveness of Thomas Hildebrand, Jr., as his trial attorney. The defendant tried numerous avenues to have the allegation of judicial bias addressed. As a result of the trial court's actions, the defendant never received a ruling on his motion for substitution of judge and there was no way for him to have the motion considered. To allow this would lead to an absurd result and create a trap for the defendant who tries to follow the rules only to be foreclosed from a remedy.

We conclude that the trial court's denial of the defendant's postconviction petition should be vacated and this cause remanded to the trial court so that the defendant's motion for substitution of judge may be considered. By this order, we express no opinion on the question of whether Judge Hackett was biased or whether his impartiality might reasonably be questioned in this case.

For the foregoing reasons, the judgment of the circuit court of Madison County is vacated and this cause is remanded for further proceedings.

Motion denied; judgment vacated; cause remanded.