

NOTICE

Decision filed 03/03/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0375

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 99-CF-2
	)	
JERRY GREER,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WEXSTTEN delivered the judgment of the court.  
Presiding Justice Chapman and Justice Donovan concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* The circuit court properly denied the defendant's postconviction petition following two third-stage hearings on its merits.

On appeal from the circuit court's denial of his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)), the defendant, Jerry Greer, argues that we should reverse the circuit court's judgment and remand his cause for an evidentiary hearing. In response, the State maintains that the defendant "has had the advantage of two evidentiary hearings" and that the postconviction claims he advances on appeal are without merit. For the reasons that follow, we agree with the State and accordingly affirm the circuit court's judgment.

BACKGROUND

In January 1999, the State filed an indictment charging the defendant with one count of first-degree murder (count I). In September 1999, the State filed an amended indictment charging the defendant with three additional counts of first-degree murder (counts II, III, and

IV). All four counts stemmed from the defendant's involvement in an incident in Alton that resulted in the shooting death of Courtney Stephenson. In April 2000, the cause proceeded to a jury trial, where the defendant was found guilty on count II. In January 2002, the defendant's conviction was affirmed on direct appeal. *People v. Greer*, 326 Ill. App. 3d 890 (2002).

In June 2002, the defendant filed a *pro se* petition for postconviction relief and a motion for the appointment of counsel. In his *pro se* petition, the defendant raised numerous ineffective-assistance-of-counsel claims, including a claim that his trial attorney had "failed to argue speedy[-]trial issues." In July 2002, postconviction counsel was appointed to represent the defendant, and the matter was set for further proceedings. In June 2003, appointed counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and in October 2003, counsel filed a supplemental petition for postconviction relief on the defendant's behalf. In December 2003, the cause proceeded to a hearing.

At the outset of the December 2003 hearing, appointed counsel advised the court that in light of the supplemental petition that had been filed on the defendant's behalf, he would be filing a second Rule 651(c) certificate, which he did in February 2004. Counsel then argued the merits of the defendant's various contentions. In support of the defendant's speedy-trial claim, counsel stated that it was the defendant's "contention" that he had never been "consulted about any of the continuances that were granted relating to this matter[,] and as a result of that fact, his rights were violated[,] and there should have been a speedy[-]trial argument made \*\*\* prior to beginning the jury trial." The defendant was present at the hearing, but no evidence was presented for the circuit court's consideration. The court took the matter under advisement.

In March 2005, the defendant filed a *pro se* supplemental brief in support of his supplemental postconviction petition. In July 2005, the defendant sent a letter to the circuit

clerk inquiring about the status of the petition. In August 2005, the defendant and appointed counsel both sent letters to the circuit court inquiring about the status of the defendant's petition, and the defendant filed a *pro se* motion for leave to amend the petition with additional claims. In September and December 2005, the circuit clerk received further letters from the defendant inquiring about his petition. In February 2006, noting that the State had never filed an answer to his petition, the defendant filed a motion for a default judgment. In May 2006, the defendant sent the circuit clerk another letter inquiring about his petition's status.

In November 2006, the circuit court entered a written order denying the defendant's petition for postconviction relief. Indicating that it had previously held an evidentiary hearing on the defendant's petition, the court rejected the defendant's ineffective-assistance-of-counsel claims. Writing that "[t]hrough a series of errors and misunderstandings, the [c]ourt thought this matter had been resolved and closed long ago," the circuit court also apologized for its lengthy delay in entering its order denying the defendant's petition. When referencing the defendant's speedy-trial argument, the court specifically stated that the record did not "indicate a viable speedy[-]trial claim."

On appeal from the circuit court's order denying his petition for postconviction relief, the defendant maintained, *inter alia*, that his petition had never proceeded to an evidentiary hearing. In September 2008, this court found that despite the circuit court's "reference to an evidentiary proceeding" and the court's belief "that the petition [had] survived a second-stage dismissal and warranted a third-stage evidentiary hearing," the record on appeal failed to indicate that an evidentiary hearing on the defendant's petition had ever been held. *People v. Greer*, No. 5-06-0676, order at 5, 8 (2008) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)). This court therefore remanded the cause "for an evidentiary hearing on all the pertinent issues raised by [the defendant] and his appointed counsel." *Greer*, No.

5-06-0676, order at 8.

In March 2009, appointed counsel filed a second supplemental petition for postconviction relief on the defendant's behalf and another Rule 651(c) certificate. The second supplemental petition alleged additional ineffective-assistance-of-counsel claims and reasserted those previously raised. In April 2009, appointed counsel filed a memorandum of law in support of the defendant's second supplemental petition, and on June 9, 2009, the cause proceeded to a hearing.

At the commencement of the June 2009 hearing, the circuit court stated that although the defendant's cause had been remanded for an evidentiary hearing because the record on appeal had failed to indicate that such a hearing had been conducted, an evidentiary hearing on the defendant's petition had, in fact, taken place in December 2003. The court further stated that it had located a transcript of the December 2003 hearing, and to clarify the "error in the record," it was making the transcript "part of the record now." The State subsequently moved to dismiss the defendant's second supplemental petition for postconviction relief, arguing that it was a successive petition filed without leave of the court (see 725 ILCS 5/122-1(f) (West 2008)). In response, acknowledging that there had been a prior hearing on the defendant's original postconviction petition, appointed counsel stated that he had filed the second supplemental petition and an accompanying Rule 651(c) certificate in light of this court's remand order. Appointed counsel then asked the court for retroactive leave to file the second supplemental petition. In response, the State acknowledged that this court's remand order had caused "some confusion with regard to the status of this case."

Agreeing that the situation was "confusing," the circuit court denied the State's motion to dismiss and deemed the second supplemental petition "an amendment or a supplement to the petition previously filed." Postconviction counsel then argued the merits of the new claims raised in the second supplemental petition and stood on "the arguments previously

made" at the December 2003 hearing with respect to the claims previously raised. The State made counterarguments against the defendant's new claims and reiterated its arguments made at the December 2003 hearing in response to those previously raised. The defendant was present at the hearing and personally addressed the court, but no evidence was presented for the court's consideration. The court took the matter under advisement.

On June 23, 2009, the circuit court entered a second written order denying the defendant's petition for postconviction relief. Referencing this court's remand order, the court again clarified that it had previously held an evidentiary hearing on the defendant's petition and had since supplemented the record with a transcript of that hearing. The court also noted that the June 2009 hearing was the defendant's second evidentiary hearing. The court then reaffirmed its previously entered order and rejected the "[f]urther matters" raised in the defendant's second supplemental petition. The present appeal followed.

#### ANALYSIS

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)) sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2002). "To be entitled to postconviction relief, the petitioner must make a substantial showing of a constitutional violation." *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). In noncapital cases, the Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the circuit court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2002). If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can

move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2002). At the second stage, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). At an evidentiary hearing, the circuit court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "[i]n its discretion[,] the court may order the petitioner brought before the court for the hearing." 725 ILCS 5/122-6 (West 2002). The denial of a petition following an evidentiary hearing is reviewed *de novo* where the circuit court was not called upon to judge the credibility of witnesses and the issues presented were pure questions of law. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

The defendant first insists that despite this court's previous remand order, he has never been afforded a third-stage evidentiary hearing on his postconviction petition. As now supplemented, however, the record on appeal reveals that our remand order was entered under a mistake of fact, and the circuit court ultimately held two evidentiary hearings on the defendant's petition, one in December 2003 and one in June 2009. The defendant's argument to the contrary suggests that neither hearing was a true evidentiary hearing, because no evidence was presented at either one. "The fact that the parties did not present [evidence] at either of those hearings does not foreclose a determination that [the] defendant's petition was at the third stage of postconviction proceedings," however, because the parties could have presented evidence had they wished to do so. *People v. Andrews*, 403 Ill. App. 3d 654, 659-60 (2010). We also note that the defendant's postconviction petition was twice amended by appointed counsel, that appointed counsel thrice certified that he had fully complied with the mandates of Supreme Court Rule 651(c), that the defendant's petition was not dismissed on a motion by the State, and that, in its discretion, the circuit court ensured that the defendant was present at both third-stage hearings. With respect to the fact that neither party

presented any evidence at either of those hearings, we agree with the State's observation that there was no need to present any evidence, because "all of the issues raised by the defendant were based on the record and involved no factual disputes, or were matters of law." In any event, the defendant's suggestion that his petition never advanced beyond the second stage of postconviction proceedings is belied by the record.

The defendant next challenges the circuit court's rejection of his speedy-trial claim. As amended and argued by appointed counsel, the defendant's claim was that because the defendant had not been consulted regarding the continuances that trial counsel obtained on his behalf, the continuances were not attributable to him, that trial counsel was ineffective for failing to argue that the continuances had thus denied the defendant his right to a speedy trial, and that counsel on direct appeal was ineffective for failing to argue that trial counsel was ineffective for failing to argue that the continuances had denied the defendant his right to a speedy trial. In the proceedings below, the State responded to this argument by noting there were "numerous \*\*\* opinions stating that counsel can continue the cause without the client's specific consent." As previously noted, when denying the defendant's postconviction petition, the circuit court determined that the record did not "indicate a viable speedy[-]trial claim."

A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), *i.e.*, a defendant must show "(1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the attorney's deficient performance resulted in prejudice." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). To establish prejudice, a defendant must demonstrate that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

"Claims of ineffective assistance of appellate counsel are evaluated under the same two-prong standard set forth in *Strickland* for assessing claims of ineffective assistance of trial counsel." *People v. Harris*, 206 Ill. 2d 1, 34 (2002). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that in his judgment are without merit." *People v. Mitchell*, 189 Ill. 2d 312, 332 (2000). To establish that appellate counsel was ineffective for failing to raise a specific claim, a defendant must establish that the claim would have been successful if raised on direct appeal. *People v. Enis*, 194 Ill. 2d 361, 386 (2000). That is the case because a defendant "suffers no prejudice unless the underlying issue is meritorious." *People v. Jones*, 219 Ill. 2d 1, 23 (2006).

"A defense counsel's failure to move for discharge of his client on the ground of a speedy-trial violation constitutes ineffective assistance of counsel where there is at least a reasonable probability that the defendant would have been discharged had a timely motion been filed and no justification exists for the defense counsel's decision not to file a motion." *People v. Cooksey*, 309 Ill. App. 3d 839, 844 (1999). "The defense counsel's failure to move for discharge or dismissal, however, cannot demonstrate either deficient performance on the defense counsel's part or prejudice to the defendant where no lawful grounds exist to move for discharge or dismissal." *Cooksey*, 309 Ill. App. 3d at 844.

"Generally, for purposes of tolling the speedy-trial period, a defendant is charged with delay caused by defense motions," and "where a defense attorney requests a continuance on behalf of a defendant, the resulting delay is attributable to the defendant." *People v. Hall*, 194 Ill. 2d 305, 328 (2000). Moreover, "[t]he record need not affirmatively show that, in

conjunction with a request for a continuance, the attorney has consulted with the defendant." *Hall*, 194 Ill. 2d at 328. "Such a rule would 'intolerably burden' the trial courts," and " 'an ordinary, uncontested motion for a continuance does not involve rights of the accused of such a substantial nature as to invalidate the actions that occur without the accused's express consent.' " *Hall*, 194 Ill. 2d at 328 (quoting *People v. Bowman*, 138 Ill. 2d 131, 142 (1990)). "Finally, where a defendant does not promptly repudiate an attorney's unauthorized act upon receiving knowledge of the same, the defendant effectively ratifies the act." *Hall*, 194 Ill. 2d at 328-29.

Here, the record shows that trial counsel obtained numerous continuances on the defendant's behalf, and the delays that resulted from those continuances were properly attributable to the defendant for speedy-trial purposes. *People v. Mayo*, 198 Ill. 2d 530, 537 (2002). The defendant nevertheless suggests that the continuances and their resulting delays were not attributable to him, because his trial attorney did not consult with him before obtaining the continuances. Consultation with the defendant was not required, however (*Hall*, 194 Ill. 2d at 328), and the continuances were "were attributable to the defendant, whether or not he personally agreed to them" (*People v. Bradley*, 348 Ill. App. 3d 677, 684 (2004)). Moreover, the defendant has never alleged or even suggested that he ever attempted to promptly repudiate any of the obtained continuances upon receiving knowledge of them. As a result, the defendant "effectively ratified the acts of appointed counsel," and the circuit court rightfully concluded that the defendant's postconviction speedy-trial claim was not viable. *Hall*, 194 Ill. 2d at 329.

As an alternative speedy-trial argument, the defendant asserts that his trial attorney was ineffective for failing to seek a dismissal of count II by invocation of the so-called *Williams* rule (see *People v. Phipps*, 238 Ill. 2d 54, 65-70 (2010); *People v. Williams*, 204 Ill. 2d 191, 197-208 (2003)), under which he contends the continuances he obtained with

respect to count I were not attributable to him with respect to count II. The defendant has forfeited the consideration of this alternative claim, however, because he raises it for the first time on appeal. See *People v. Ligon*, 392 Ill. App. 3d 988, 995 (2009); 725 ILCS 5/122-3 (West 2002). Moreover, forfeiture aside, the defendant's argument is without merit. The supreme court did not formally adopt the *Williams* rule until April 2003 (see *Williams*, 204 Ill. 2d at 191), three years after the defendant was tried and convicted. Prior to April 2003, under the controlling precedent of this district, the delays attributable to the defendant with respect to count I were, as a matter of law, equally attributable to him with respect to count II. See *Williams*, 204 Ill. 2d at 197-208; *People v. Gooden*, 189 Ill. 2d 209, 215-22 (2000); *People v. Gooden*, 296 Ill. App. 3d 205, 210-11 (1998). It follows that had trial counsel moved to dismiss count II by invocation of the *Williams* rule, the motion would not have been successful, and the defendant's contention that his trial attorney was ineffective for failing to raise his alternative speedy-trial argument is therefore unsustainable. *Cooksey*, 309 Ill. App. 3d at 844. "[E]xisting case law would have indicated that the argument was meritless" (*People v. Mitchell*, 189 Ill. 2d 312, 333 (2000)), and "[a]n attorney is not required to make futile motions to avoid charges of ineffective assistance of counsel" (*People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000)). Given our disposition of this issue, we need not address the State's argument that count II did not constitute a "new offense" for purposes of the *Williams* rule.

#### CONCLUSION

For the foregoing reasons, we hereby affirm the circuit court's judgment denying the defendant's petition for postconviction relief.

Affirmed.