

No. 1-10-3003

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).

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. 04 CR 25163 |
| |) | |
| FILIP ADAMSKI, |) | Honorable |
| |) | James B. Linn, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not deprived of his right to due process, where postconviction counsel elected to stand on his petition as written. Doing so did not constitute an "implicit withdrawal," the State was not obligated to file a written motion to dismiss, and the trial court did not improperly rely solely on the representations of postconviction counsel.
- ¶ 2 Following a negotiated guilty plea, defendant Filip Adamski was convicted of two counts of predatory criminal sexual assault and sentenced to consecutive terms of 10 years' incarceration. Defendant filed a postconviction petition which was summarily dismissed. Defendant filed a successive postconviction petition and the trial court appointed counsel to

assist defendant. Appointed counsel did not amend the petition, the trial court granted the State's oral motion to dismiss, and defendant appealed. On appeal, defendant does not argue that the trial court's finding regarding the merits of his petition was incorrect, nor does he argue that appointed counsel failed to comply with the requirements of Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Instead, defendant identifies three alleged procedural defects and argues that he was denied his right to due process.

¶ 3 Following an incident at his mother's home, defendant was arrested and charged, in a 76 count indictment with, *inter alia*, multiple counts of the predatory criminal sexual assault of his 10-year-old half-sister, C. G. Defendant was psychologically evaluated several times, and found to be fit for trial, able to understand the *Miranda* warnings, and sane at the time of the offense. The trial court conducted a Supreme Court Rule 402 (eff. July 1, 1997) conference, and the State agreed to accept a guilty plea to two counts of predatory criminal sexual assault (penis to vagina and penis to mouth) with consecutive 10-year sentences in exchange for dismissing the remaining charges. The trial court admonished defendant, and he signed a jury waiver and agreed to plead guilty.

¶ 4 The State provided a factual basis for the plea which described in graphic detail how defendant tied up his grandmother, who was babysitting his two younger siblings, struck and injured his half-brother before locking him in a bathroom, and used physical violence to force C. G. to copulate with him vaginally and orally. The State further indicated that biological testing indicated the presence of semen in C. G.'s mouth and hair with a DNA profile consistent with defendant.

¶ 5 The trial court admonished defendant of his appeal rights, but defendant did not move to withdraw his guilty plea, file a notice of appeal, or file any other postplea pleading.

¶ 6 In 2007, defendant filed a postconviction petition alleging ineffective assistance of counsel. The trial court summarily dismissed the petition. Defendant did not file a timely appeal, and his 2009 motion to file a late notice of appeal was denied.

¶ 7 In 2009, defendant filed a successive postconviction petition. Without comment the trial court appointed counsel to represent defendant on the petition. On July 8, 2010, the following colloquy occurred between the court and the parties:

"MR. BLACK [assistant Public Defender]: Judge, I would be seeking leave to file my 651-C certificate this morning.

THE COURT: Okay, 651-C is filed.

MS. PLITZ [assistant State's Attorney]: We would ask for—

THE COURT: Just a second. What is this about?

MR. BLACK: He's got a number of contentions, Judge. One is that the statute under which he was convicted was unconstitutional at the time he was convicted. Another is he made statements to the police in violation of his 6th and 14th amendments.

THE COURT: But he pled, right?

MR. BLACK: He pled guilty.

THE COURT: Do you want to argue it?

MS. PLITZ: The People could argue it, your Honor.

THE COURT: Argue.

MR. BLACK: I don't want to argue at this moment. I do want to tell my client if the State is going to file a motion to dismiss.

THE COURT: They will file a motion to dismiss. They will say that it's all baseless and groundless and that he pled and waived all of his —

MR. BLACK: Judge, well, I'm standing on – at this point I'm standing on his petition. I have outlined his contentions. I've consulted with him by phone a number of times, by letter. I have found no merit to his contentions at this time. So I'm unable to do an amended petition.

THE COURT: You what?

MR. BLACK: I'm unable to amend his petition.

THE COURT: I understand exactly. I'm trying to get this off your plate. You say you're not ready to argue?"

The parties agreed to continue the matter "to argue the State's motion to dismiss."

¶ 8 At the next court date, the following colloquy occurred:

"MR. BLACK: We are ready to argue.

THE COURT: Okay. Go right ahead.

MS. PLITZ: You Honor, on the last court date the People –

THE COURT: All right. Go ahead. Tell me why he's entitled to post-conviction relief.

MR. BLACK: Judge, this is a case in which [defendant] has alleged that his attorney was ineffective. That he is actually innocent of the crime in this case, and that the statute under which he was convicted –

THE COURT: Who was his lawyer?

MR. BLACK: His lawyer was the Public Defender's Office, Judge.

THE COURT: Okay.

MR. BLACK: And that the statute under which he was convicted was unconstitutional at the time that he was convicted, Judge. Those are the allegations in the petition, Your Honor.

I have investigated those allegations. I have had numerous conversations with [defendant] over the phone. I've communicated with him through numerous letters regarding his allegations.

I am unable to file an amended or corrected petition in this case, Judge and we ask that you honor this petition, Judge.

THE COURT: This was a negotiated plea of guilty. He plead [*sic*] guilty to various assaults on his sister, I believe, if memory serves me correctly, and received the penitentiary sentence. It was 20 years in total 10 plus 10.

Okay. What he's bringing up in this petition, I don't see any issues with his lawyer that are articulated to the point that he would be entitled to some kind of hearing about that.

It appears more in the nature of a late motion to withdraw his pleas. Very late, way beyond 30 days max is the post-conviction petition.

I'm confident that you've investigated this thoroughly.

And I see no basis for any relief so his post-conviction petition is denied."

Defendant filed a motion to reconsider, which the trial court denied, and defendant timely appealed.

¶ 9 Defendant first argues that he was denied due process because appointed counsel "implicitly withdrew" without complying with the procedures identified in *People v. Greer*, 212 Ill. 2d 192 (2004). We find that defendant's description of the proceedings is misleading and that appointed counsel did not withdraw either expressly or implicitly. Appointed counsel merely expressed doubts about the merits of defendant's *pro se* claims at one court appearance, and then later indicated that he would stand on the *pro se* petition. Although counsel had the option to withdraw, remaining on the case and standing on the petition as written was also an option. See

People v. Pace, 386 Ill. App. 3d 1056, 1062 (2008). We need not consider whether expressing doubt about the merits of a postconviction petition constitutes reasonable assistance; defendant has elected not to make a Rule 651(c) argument.

¶ 10 Second, defendant argues that he was denied due process because the State orally moved to dismiss his petition in violation of section 122-5 of the Post-Conviction Hearing Act (725 ILCS 5/122-5 (West 2008)). Defendant argues that we should interpret section 122-5 as requiring a written motion to dismiss. Defendant essentially asks us to read the words "in writing" into the Act, where those words do not appear. We find no reason to do so. See *People v. Gutman*, 2011 IL 110338, ¶ 12 ("The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning.") Had the legislature intended to limit the State to written motions to dismiss, it could easily have done so. See, e.g., 725 ILCS 5/122-2.1 (West 2008) (requiring a that a petition be dismissed in a "written order.")

¶ 11 Finally, defendant argues it is "clear that a trial court may not simply rely on the unsupported claims of a petitioner's attorney that the petition is meritless." It is not clear that the trial court simply relied on the statements by defendant's attorney. Rather, it appears that the trial court relied on its own recollection of the facts and analysis of the merits of the contentions in defendant's petition. Defendant relies on *Greer*, to argue that it is impermissible for the trial court to dismiss a postconviction petition during second stage proceedings in the absence of a motion by the State. However, that is not the case before us; the State moved orally to dismiss the petition, but the trial court cut the prosecutor off and identified the bases it anticipated the State would cite. *Greer* does not set forth minimum requirements for a motion to dismiss, defendant identified no authority that does, and we see no need to impose them ourselves. Appointed counsel was aware that the State wished the trial court to dismiss the petition, was given ample time to prepare for argument on such a motion, and merely concluded that it was

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appropriate to stand on the *pro se* petition as written. We find no due process violation of a constitutional dimension in this scenario.

¶ 12 For the reasons above, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.