

¶ 4 The trial court asked Mr. Roustio if he discussed this matter with the defendant and he indicated that he had. Mr. Roustio explained that he looked back at his closed files and found that he did represent Ms. Hopson on disorderly conduct and harassment by telephone charges. He stated that he was hired by Ms. Hopson on May 4, 2005, to quash her bench warrant and to reset the cases. The first court date was June 23, 2005, and he appeared with Ms. Hopson. The cases were dismissed. He described his contact with Ms. Hopson as one telephone call and a brief meeting at court on June 23, 2005. Mr. Roustio told the court that he explained to the defendant that he represented Ms. Hopson and that her cases were in no way related to his case.

¶ 5 The trial court addressed the defendant and stated:

"First of all, the Court, from what I know about the situation so far, would find it hard to believe that Mr. Roustio's representation of [the defendant] would be in any way compromised or has been in any way compromised by a prior representation of a potential State witness. But I will tell you, [defendant], that if you wish, I would upon your request mistry the case, order it reset, and give you the opportunity to hire another lawyer.

Would that be your wish, sir?"

The defendant stated that he wished to proceed with Mr. Roustio.

¶ 6 The State expanded on the court's comment about giving the defendant an opportunity to hire another lawyer by pointing out that because Mr. Roustio was a public defender, the court could appoint another attorney to represent the defendant if he so requested. The State then asked the trial court to explain to the defendant how the conflict could affect his representation. The State said that because Mr. Roustio represented both the defendant and Ms. Hopson contemporaneously, there was a *per se* conflict of interest, and the defendant would have to waive the conflict if he wanted Mr. Roustio to continue to represent him.

¶ 7 The trial court explained to the defendant that Mr. Roustio had a duty to observe the attorney/client privilege and that if, on cross-examination of Ms. Hopson, something came up that was "disclosed to him when he had a duty to maintain the attorney/client privilege, he might be prohibited from getting into this." The court continued, "But of course, he would have to disclose that, we'd know about it, it wouldn't be a situation where he could proceed without informing you of that." The court then asked the defendant again whether he wished to waive the conflict of interest. The defendant answered affirmatively.

¶ 8 The trial court inquired if the defendant understood what "waive" meant. The following discussion took place:

THE COURT: Now waive basically means you give up an objection that you might raise—

THE DEFENDANT: Okay.

THE COURT: You follow that?

THE DEFENDANT: Yes, sir.

THE COURT: So do you wish to give up any objection you might have raised to Mr. Roustio continuing to represent you, knowing that at some point in time previous to this Mr. Roustio had an involvement in your case and he represented a witness that the State may call in your case?

THE DEFENDANT: I wish that he proceed—proceed with it."

¶ 9 Ms. Hopson testified for the State, and the jury returned a guilty verdict. The defendant was sentenced to 35 years' imprisonment. The defendant appealed, arguing only that he was entitled to one additional day of credit against his prison sentence. This court modified the judgment to reflect an additional day of credit, but otherwise affirmed the judgment. *People v. Green*, No. 5-07-0384 (2008) (unpublished Summary Order under Supreme Court Rule 23(c)(2) (eff. May 30, 2008)).

¶ 10 On July 29, 2008, the defendant filed a *pro se* postconviction petition alleging that his constitutional right to conflict-free counsel was violated. He argued that Mr. Roustio labored under a *per se* conflict of interest because he had previously represented Ms. Hopson. He further alleged that the trial court conducted an inadequate factual inquiry with respect to his waiver of his constitutional right to conflict-free counsel and that its admonishments were inadequate to fully advise him of what affect such a conflict of interest may have on defense counsel's performance. Finally, the defendant argued that his waiver was not knowingly and intelligently made.

¶ 11 On November 26, 2008, the trial court appointed counsel to represent the defendant in the postconviction proceedings. Retained counsel was later substituted for appointed counsel. On November 23, 2009, the defendant, by his attorney, filed an amended petition for postconviction relief. The defendant alleged that the trial court did not adequately advise him of the *per se* conflict of interest caused by Mr. Roustio's representation of both the defendant and Ms. Hopson, that it failed to advise him that, upon his request, the court would call a mistrial and, if appropriate, another attorney could be appointed to represent him, and that its inquiries as to waiver were inadequate. The defendant argued that there was no knowing and intelligent waiver of the conflict of interest. The defendant also argued that his direct appeal counsel provided ineffective assistance of counsel for failing to present the conflict-of-interest issue.

¶ 12 On December 30, 2009, the State filed a motion to dismiss. The State argued that Mr. Roustio was not laboring under a *per se* conflict of interest, that the defendant failed to establish an actual conflict of interest or that he suffered prejudice from the alleged conflict of interest, and that the defendant knowingly and intelligently waived any conflict that might have existed. The motion to dismiss was heard on July 21, 2010. The trial court found that no *per se* conflict of interest existed and that even if a *per se* conflict of interest did exist, the

defendant knowingly and intelligently waived it. On July 22, 2010, the trial court entered an order granting the State's motion to dismiss. The defendant filed a timely notice of appeal.

¶ 13

ANALYSIS

¶ 14 The defendant argues that the trial court erred in dismissing his postconviction petition without an evidentiary hearing because he made a substantial showing that he was deprived of his constitutional right to conflict-free counsel.

¶ 15 The defendant's postconviction petition advanced to the second stage of proceedings. At this stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). All well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *Id.* "The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). If the petition is dismissed at this stage, the trial court's decision is reviewed using a *de novo* standard. *Pendleton*, 223 Ill. 2d at 473.

¶ 16 The sixth amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel including the right to conflict-free representation. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). "Such representation means assistance by an attorney whose loyalty to his or her client is not diluted by conflicting interests or inconsistent obligations." *Id.* Conflicts of interest can be either *per se* or actual. *Id.* If defense counsel has an actual or potential conflict of interest stemming from a previous or current commitment to a party with interests adverse to the defendant, the defendant may waive the conflict. *People v. Graham*, 206 Ill. 2d 465, 472 (2003).

¶ 17 Because the defendant in the instant case waived his right to conflict-free counsel, we need only address whether his waiver was knowingly and intelligently made. The trial court

must adequately inform a defendant of a conflict's significance before any waiver of such a conflict can be accepted. *People v. Coleman*, 301 Ill. App. 3d 290, 301 (1998). Before his right to conflict-free counsel can be knowingly waived, the defendant must actually understand how the conflict could affect his attorney's representation. *Id.* Whether a waiver has been knowingly and intelligently made depends on the facts and circumstances of the case, including the background, experience, and conduct of the defendant. *People v. Lewis*, 88 Ill. 2d 429, 437-38 (1981).

¶ 18 In the instant case, the defendant argues that the trial court's inquiry into his understanding of the conflict was insufficient to produce a knowing waiver. Specifically he argues that the trial court should have explained that Mr. Roustio's relationship with Ms. Hopson could cause him to tread more lightly in his cross-examination of her. The trial court did in fact inform the defendant of this. In the discussion of the possible conflict, the State said that Ms. Hopson could testify to something that Mr. Roustio knew about from his representation of her that "he can't impeach her with because of attorney/client privilege." The court explained to the defendant that attorney/client privilege meant that certain communications between the client and the attorney are protected and cannot be disclosed except in limited circumstances. The trial court then told the defendant that if, during cross-examination, something came up "that may have been disclosed to [Mr. Roustio] when he had a duty to maintain the attorney/client privilege, he might be prohibited from getting into this." Additionally, the trial court informed the defendant that if he asked for a mistrial, the court would grant it, and he would have the opportunity to hire another attorney. The State pointed out that because Mr. Roustio was a public defender, the court could appoint a new attorney for the defendant if he so requested.

¶ 19 The defendant further argues that he dropped out of school in the ninth grade and his lack of education prevented him from making a knowing waiver. The trial court asked the

defendant whether he understood what "waive" meant. The defendant stated that he did. The trial court went on to define "waive" as to "give up an objection that you might raise." It then asked the defendant if he followed that and, when he responded in the affirmative, the court asked, "So do you wish to give up any objection you might have raised to Mr. Roustio continuing to represent you, knowing that at some point in time previous to this Mr. Roustio had an involvement in your case and he represented a witness that the State may call in your case?" The defendant responded that he wished to proceed with Mr. Roustio as his attorney. The trial court explained waiver in basic terms, and the defendant indicated he understood. Aside from the defendant's allegation that he had limited education, there is nothing in the record to show that his lack of education made him incapable of understanding the waiver.

¶ 20 The defendant failed to make a substantial showing that he was deprived of his constitutional right to conflict-free counsel. The defendant was adequately advised of the conflict and how it could affect his attorney's ability to represent him, the trial court explained the meaning of waiver in terms the defendant could understand, and the defendant unambiguously waived his right to conflict-free counsel.

¶ 21 The defendant next argues that his counsel on appeal was ineffective for failing to present to this court the issue of his trial counsel's conflict of interest. Based on our discussion above that the defendant waived any conflict of interest, we find that appellate counsel was not ineffective for failing to raise a meritless issue.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

¶ 24 Affirmed.