

defendant's wife ultimately relented and performed oral sex on the defendant as he demanded. The defendant then drove her from Lawrence County to Clark County "against her will." Following a high-speed pursuit by law enforcement, the defendant was arrested in Clark County, and his wife was taken to a Lawrence County hospital for treatment. The defendant was later charged by information with two counts of aggravated criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)) (counts I and II) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)) (count III).

¶ 5 At the defendant's first appearance in October 2007, the defendant requested counsel, and the trial court appointed public defender Brad Vaughn to represent him. At the defendant's preliminary hearing in November 2007, however, the defendant appeared with private counsel, Roscoe D. Cunningham. In December 2007, the defendant again appeared with attorney Cunningham, and the trial court set a final pretrial conference for March 12, 2008.

¶ 6 On February 8, 2008, alleging "no payment made for legal services rendered," Cunningham filed a motion to withdraw as counsel for the defendant. On February 25, 2008, the trial court entered an order granting Cunningham's motion to withdraw. In its order granting the motion, the trial court directed Cunningham to serve the defendant with a copy of the order pursuant to Supreme Court Rule 13 (eff. July 1, 1982) and further directed the circuit clerk to forward a copy of the order to the defendant. Despite these directives, however, it is unclear whether the defendant ever received a copy of the order.

¶ 7 On March 12, 2008, the defendant appeared at the final pretrial conference without an attorney. At the outset of the conference, the State relayed the following:

"Your Honor, we were initially set for a final pretrial. Since then, I believe the record is clear, Mr. Cunningham has withdrawn his representation. I spoke with [the defendant] outside the [c]ourt[room]. I asked him if he wanted the Court to appoint

an attorney or if he wanted to speak with me. He advised he wanted to speak with me.

I think we have a plea agreement to present to the Court."

Thereafter, the defendant waived his right to counsel and after being admonished pursuant to Supreme Court Rule 402 (eff. July 1, 1997) pled guilty to count II of the State's information in exchange for a 12-year sentence and the State's dismissal of counts I and III. The defendant did not pursue a direct appeal from his conviction.

¶ 8 In September 2009, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)). In his *pro se* petition, the defendant alleged that when he appeared at the final pretrial conference in March 2008, he had "expected to be met by his attorney, Roscoe D. Cunningham, [but] instead was met by [the] State's Attorney *** outside the courtroom." The defendant further alleged that after informing him that Cunningham had "'quit [him],' " the State's Attorney had "then said[,] 'You can take 12 years now[,] or I'll give you 20 or better next week at trial.'" Claiming that he had not previously been informed that he "no longer had legal representation" and that he felt "ambushed and threatened" by the State's comments, the defendant suggested that his guilty plea had not been knowingly and voluntarily entered.

¶ 9 The defendant's *pro se* petition included an affidavit from inmate Tyler Newlin, who indicated that on March 12, 2008, he had been outside the courtroom along with the defendant and had witnessed the encounter between the defendant and the State. Among other things, Newlin specifically maintained that he had "witnessed the State[']s Attorney *** approach [the defendant] and inform him that his attorney had 'quit.'" According to Newlin's affidavit, the State's Attorney "then made the following statement in a threatening tone[:]' 'You can take the 12 years today, or I will give you 20 years next week at trial.' "

¶ 10 In March 2010, the trial court appointed attorney Matthew Hartrich to represent the defendant on his postconviction petition. In June 2010, Hartrich filed an amended petition

on the defendant's behalf, which, *inter alia*, included the following allegation:

"The State's Attorney spoke with [the defendant] without his attorney being present and obtained the guilty plea with [the defendant] without his attorney being present, which violated [the defendant's] right to counsel." See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8.

Notably, the State did not address this allegation in its subsequently filed motion to dismiss the defendant's amended petition for postconviction relief.

¶ 11 In September 2010, the cause proceeded to a hearing on the State's motion to dismiss the defendant's amended postconviction petition. When arguing that the trial court should grant the defendant an evidentiary hearing on the amended petition, attorney Hartrich's statements included the following:

"And, furthermore, the State's Attorney spoke with [the defendant] without his attorney being present and obtained this guilty plea from [the defendant]. It's reflected at the beginning of the transcript on March 12, 2008. It actually starts out on the very first page with the *** State's Attorney *** indicating that he spoke to [the defendant] about this case and negotiated a plea with him or, at least, obtained a plea from him.

I would argue that that was a violation of [the defendant's] *** right to counsel right there. Even if later on in the plea hearing *** [the defendant] waived his right to counsel[,] *** I'd argue that his right to counsel had already been violated by *** the *** State's Attorney. And[,] as a result, [the defendant's] constitutional rights were violated and *** the [State's] [m]otion to [d]ismiss shouldn't be granted."

In response, the State's Attorney argued:

"I don't believe there's anything that says that the State's Attorney cannot talk with the defendant if he's not represented by counsel. At that point, [the defendant]

was not represented by counsel. When the plea was taken, he was asked if he wanted counsel[,] and *** [he] indicated that he did not. So I don't know how there's a constitutional violation."

¶ 12 When subsequently granting the State's motion to dismiss the defendant's amended petition for postconviction relief, the trial court noted that when entering his guilty plea, the defendant had been "offered appointed counsel, and he waived his right to appointed counsel." Thereafter, the defendant filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 Citing *People v. Card*, 188 Ill. App. 3d 213 (1989), the defendant argues that the trial court erred in dismissing his amended postconviction petition because he made a substantial showing that the State violated his sixth amendment right to counsel by "contacting him directly and negotiating a guilty plea with him." We agree.

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) 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 2008). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002).

¶ 16 At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). A postconviction petition is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

¶ 17 If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss his petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2008). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the defendant's petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245.

¶ 18 "The dismissal of a postconviction petition is warranted at the second stage of the proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At the second stage, "all factual allegations that are not positively rebutted by the record are accepted as true." *Id.* "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *Id.*

¶ 19 "The sixth amendment guarantees a right to counsel after the initiation of adversarial proceedings and guarantees counsel's presence during any communication between State agents and the defendant." *People v. Ramirez*, 402 Ill. App. 3d 638, 642-43 (2010). "The sixth amendment right to counsel attaches at or after the initiation of adversarial judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 643.

¶ 20 If at an arraignment or similar proceeding a defendant requests or is appointed counsel, he has invoked his sixth amendment right to counsel, and the State cannot thereafter initiate a conversation with him regarding the criminal activity with which he is charged. *People v. Maust*, 216 Ill. App. 3d 173, 179 (1991); *People v. Farrell*, 181 Ill. App. 3d 446, 450 (1989). Furthermore, in the absence of counsel, "any purported waiver of counsel in that situation is invalid." *People v. Kruger*, 363 Ill. App. 3d 1113, 1122 (2006).

¶ 21 Because plea negotiations are part of the prosecutorial process, a defendant has the sixth amendment right to the presence of counsel during plea negotiations. *Card*, 188 Ill. App. 3d at 215; see also *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 9 (noting that "the importance of defense counsel's effective representation in the context of plea negotiations was recently reinforced by two recent United States Supreme Court opinions"). In the context of plea negotiations, a defendant who has previously invoked his sixth amendment right to counsel can validly waive that right only if he, rather than the State, "initiated the plea bargaining." *Card*, 188 Ill. App. 3d at 215.

¶ 22 In *Card*, the defendant requested counsel at his initial appearance and then requested and received a brief recess. *Card*, 188 Ill. App. 3d at 214. "Upon returning, the assistant State's Attorney indicated that a negotiated disposition had been reached," and the defendant withdrew his request for counsel and entered a fully negotiated guilty plea. *Id.* at 214, 216. On appeal from the trial court's denial of his motion to withdraw his guilty plea, the defendant argued that by negotiating a plea with him after he had invoked his right to counsel, the State had violated his sixth amendment right to counsel, and as a result, his guilty plea had not been knowingly and voluntarily entered. *Id.* at 214-15. The defendant's claims were soundly rejected, however, because the record revealed that he, himself, had "initiated the plea negotiations and[,] in so doing, waived his sixth amendment right to counsel." *Id.* at 216.

¶ 23 Here, the defendant invoked his sixth amendment right to counsel when he requested and was appointed an attorney at his first appearance. Thereafter, the State was precluded from initiating contact with the defendant, Cunningham's withdrawal notwithstanding. The record demonstrates, however, that the State approached the defendant outside the courtroom before the final pretrial conference and, after advising him that Cunningham was no longer his attorney, offered him a plea bargain. The record thus demonstrates that the State

improperly initiated the plea negotiations in violation of the defendant's sixth amendment right to counsel. *Cf. Card*, 188 Ill. App. 3d at 214-16.

¶ 24 Under the circumstances, the defendant made a substantial showing of a constitutional violation with respect to the plea negotiations that led to his guilty plea, and the trial court erred in granting the State's motion to dismiss the defendant's amended petition for postconviction relief. We accordingly reverse the trial court's judgment and remand the defendant's cause for an evidentiary hearing on his postconviction allegation that the State spoke with him and obtained his plea in violation of his sixth amendment right to counsel.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, we reverse the trial court's judgment granting the State's motion to dismiss the defendant's amended petition for postconviction relief and remand for an evidentiary hearing.

¶ 27 Reversed and remanded.