2013 IL App (4th) 120935-U

NO. 4-12-0935

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KHAILIEO TERRY, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 07CF1448 Honorable Heidi N. Ladd, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to prove he promptly repudiated the acquiescence to the State's motion to continue by an attorney who appeared on behalf of his attorney, the trial court properly denied defendant's postconviction petition.

¶ 2 In March 2010, defendant, Khailieo Terry, filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)). In February 2012, appointed counsel filed a supplement to defendant's postconviction petition. After an evidentiary hearing, the Champaign County circuit court denied defendant's request for postconviction relief.

¶ 3 Defendant appeals, asserting his conviction should be vacated because he was deprived of his constitutional right to be represented by counsel of his choosing, which led to a statutory speedy-trial violation. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2007, the State charged defendant by information with one count of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(a)(2)(A) (West Supp. 2007)), alleging he possessed with intent to deliver 15 or more but less than 100 grams of a substance containing cocaine on August 22, 2007. A grand jury later indicted him on the same offense. The trial court initially appointed a public defender to represent defendant. However, on October 11, 2007, attorney Harvey Welch entered an appearance for defendant, and the court vacated the appointment of the public defender.

¶ 6 On October 15, 2007, the State filed a motion requesting the pretrial conference scheduled for October 16, 2007, be continued to November 13, 2007, because the Illinois State Police Crime Laboratory had not completed analysis of the State's evidence. On October 16, 2007, defendant's case was brought before Judge Thomas Difanis. Attorney Diana Lenik appeared and answered for Welch. Lenik did not object to the State's motion to continue the pretrial conference and instead responded, "Okay. That's fine. I'm sure nobody objects." The trial court granted the State's motion and continued the pretrial conference to November 13, 2007, on which date, Lenik again appeared for defendant on Welch's behalf. Lenik also appeared on Welch's behalf at defendant's January 2, 2008, pretrial conference. The docket entries for both the October 16, and November 13, 2007, hearings state defendant appeared personally and by counsel.

¶ 7 On January 17, 2008, Judge Heidi Ladd commenced defendant's jury trial. Defendant had been in custody since his August 22, 2007, arrest. At the conclusion of the trial, a jury found defendant guilty of unlawful possession with intent to deliver a controlled substance.

¶ 8 On February 5, 2008, defendant filed a motion to dismiss, later characterized as a motion in arrest of judgment, based on a statutory speedy-trial right violation. The motion asserted (1) he was not tried within 120 days of his arrest, (2) the October 2007 "motion to continue was granted over [d]efendant's objection," and (3) the State's request to continue was based upon an incorrect representation that evidence had not yet been analyzed. At a February 28, 2008, hearing, Judge Ladd denied defendant's motion.

¶ 9 On March 3, 2008, the trial court sentenced defendant to 20 years' imprisonment. Defendant appealed. On direct appeal, defendant argued the trial court erred by denying his posttrial motion that asserted a speedy-trial violation because (1) he did not cause or contribute to the delay, (2) the attorney agreeing to the continuance did not represent him and (a) he was neither present with counsel nor (b) consulted by counsel on October 16 regarding the continuance, (3) the State's reason for the continuance was not factually sound, and (4) no trial date had been established. *People v. Terry*, No. 4-08-0238, slip order at 4 (May 15, 2009) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction and sentence, finding defendant (1) had waived his right to a speedy trial by failing to file a motion for discharge before trial; and (2) forfeited the issue of his alleged absence from court on October 16, 2007, hearing and the issue of Lenik's representing of him on that date because he neither objected nor raised those issues to the trial court in his posttrial motion. *Terry*, No. 4-08-0238, slip order at 25. Last, we concluded no error occurred in the trial court's rulings with respect to the speedy-trial issue, and thus no plain error was shown. *Terry*, No. 4-08-0238, slip order at 25-26.

¶ 10 In March 2010, defendant filed a *pro se* postconviction petition alleging the

following: (1) his trial counsel was ineffective for counsel's failure to (a) appear at a pretrial hearing and send substitute counsel in his absence, (b) subpoena certain witnesses to testify in his defense; (c) file a motion to suppress certain evidence; (2) appellate counsel was ineffective for failing to raise the issue of his trial counsel's ineffectiveness on direct appeal; (3) substitute counsel was ineffective for agreeing to a continuance of a pretrial hearing; (4) his constitutional right to be defended by a privately retained attorney of his own choosing was violated by his counsel sending substitute counsel to the pretrial hearing; and (5) his speedy-trial right was violated. On April 14, 2010, James Dedman entered his appearance as defendant's attorney in the postconviction proceedings. In an April 27, 2010, docket entry, the trial court (1) granted defendant's counsel time to file an amended postconviction petition and (2) ordered the State to file a responsive pleading. In July 2010, the State filed an answer to defendant's *pro se* postconviction petition. On August 18, 2010, the court entered an order dismissing defendant's *pro se* postconviction petition because defendant failed to make a substantial showing of a violation of his constitutional rights.

¶ 11 Defendant appealed the dismissal of his *pro se* postconviction petition. On appeal, defendant's counsel, the office of the State Appellate Defender (OSAD), filed a motion for remand for strict compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). This court granted OSAD's motion and remanded defendant's case to the trial court with directions to hold further proceedings consistent with Rule 651(c). *People v. Terry*, 2011 IL App (4th) 100709-U.

¶ 12 On remand, Dedman filed a supplement to defendant's *pro se* postconviction petition, alleging, *inter alia*, defendant's trial counsel was ineffective for failing to appear at the

October 16, 2007, pretrial hearing and sending another attorney in his place that waived defendant's right to a speedy trial. The supplement also argued ineffective assistance of appellate counsel for failing to raise the aforementioned issue. Further, it claimed defendant's constitutional rights were violated when he was (1) not tried within 120 days of his arrest and (2) absent from the October 16, 2007, pretrial hearing. Dedman also filed the certificate required by Rule 651(c). In May 2012, the State filed an answer to the supplement.

¶ 13 In August 2012, the trial court held an evidentiary hearing on defendant's *pro se* postconviction petition and its supplement. Defendant testified he did not appear in court on October 16, 2007, and was in the Champaign County jail the entire day. Welch testified in-custody defendants were generally not brought to pretrial hearings, and he found nothing unusual about defendant's failure to be at the hearing. Welch also testified that it was a fairly common practice in Champaign County for private attorneys to have other private attorneys fill in for them at felony pretrial hearings. For several years, Welch and Lenik have filled in for each other. Welch testified he had Lenik fill in for him at defendant's October 16, 2007, pretrial hearing. He instructed Lenik to announce he was ready for trial. Welch was not surprised Lenik acquiesced to the continuance for lab reports. He explained the continuance to defendant after the October 16, 2007, pretrial hearing.

¶ 14 On September 13, 2012, the trial court entered a written order denying defendant's postconviction petition. In doing so, it found defendant's speedy-trial claim was barred by *res judicata*. On October 3, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in

postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 15 II. ANALYSIS

¶ 16 Here, defendant challenges the trial court's denial of his postconviction petition after an evidentiary hearing. Defendant's sole argument is he was deprived of his constitutional right to be represented by counsel of his own choosing, which led to a statutory speedy-trial violation requiring vacatur of his conviction.

¶ 17 The Postconviction Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 18 At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the

defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008.

¶ 19 At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Additionally, it is at this stage where the court makes fact finding and credibility determinations. *People v. Marshall*, 375 Ill. App. 3d 670, 674, 873 N.E.2d 978, 982 (2007). Thus, when the trial court denies a defendant's postconviction petition following an evidentiary hearing, we review for manifest error. *People v. Johnson*, 206 Ill. 2d 348, 357, 794 N.E.2d 294, 301 (2002). "Manifest error is that which is 'clearly evident, plain, and indisputable.' " *Johnson*, 206 Ill. 2d at 360, 794 N.E.2d at 303 (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)). Additionally, we point out this court is not bound by the trial court's reasoning for its judgment and can affirm the trial court's judgment on any ground in the record regardless of whether the trial court relied on it. *People v. Durgan*, 281 Ill. App. 3d 863, 867, 667 N.E.2d 730, 733 (1996).

¶ 20 The State asserts defendant's claim is barred by the doctrine of *res judicata* because he raised it before this court on direct appeal. When a postconviction petitioner has directly appealed a conviction, the reviewing court's judgment is *res judicata* as to all issues the reviewing court actually decided. *People v. McDonald*, 364 Ill. App. 3d 390, 392, 846 N.E.2d 960, 963 (2006). Defendant contends *res judicata* does not apply because he presented new evidence that he was not present in court on October 16, 2007, when Lenik did not object to the State's motion to continue. Our supreme court has recognized that, "in the interests of fundamental fairness, the doctrine of *res judicata* can be relaxed if the defendant presents substantial new

evidence." *People v. Patterson*, 192 Ill. 2d 93, 139, 735 N.E.2d 616, 642 (2000). Even considering the new evidence, defendant still has not shown a speedy-trial violation.

¶ 21 While the evidence at the third-stage postconviction hearing indicated defendant was not present at the October 16, 2007, pretrial hearing, defendant's absence from the courtroom does not change the conclusion we reached on direct appeal as that fact affects only a portion of our reasoning. The sixth amendment right to counsel includes the right to retained counsel of choice. *People v. Baez*, 241 Ill. 2d 44, 104-05, 946 N.E.2d 359, 395 (2011). Welch, whom defendant hired, testified how it was common practice for Lenik to fill in for him at pretrial hearings when he had other commitments. Defendant cites no authority that such a practice denies him the right to counsel of choice. The one case defendant does cite showing a violation of the right to counsel where an attorney appears in the place of the hired attorney, *People v. Gazic*, 30 Ill. App. 3d 1063, 336 N.E.2d 73 (1975), is an abstract opinion, and defendant failed to attach a full copy of it to his brief. Thus, we cannot consider it because it violates Uniform Appellate Rule 8 (Uniform Ill. App. Ct. R. 8 (amended in 1977)). *Jones v. Meade*, 126 Ill. App. 3d 897, 904, 467 N.E.2d 657, 662 (1984). Regardless, according to defendant's explanation of *Gazic*, that case dealt with a new attorney appearing at the defendant's trial, at which the defendant did not appear, and the hired attorney no longer appeared on the defendant's behalf at the trial. That situation is different from the one at issue here.

¶ 22 Moreover, defendant did not testify at the evidentiary hearing he was not present at the November 13, 2007, pretrial hearing, at which Lenik also appeared for Welch. The docket entry states defendant was present, and defendant's argument in his reply brief indicates he was present at the November 13, 2007. The record contains no evidence defendant objected to

Lenik's representation at that hearing. "Where a defendant does not object to his counsel's representation, he is deemed to have acquiesced in that representation." *People v. Assenato*, 257 Ill. App. 3d 1026, 1029, 629 N.E.2d 166, 169 (1994) (citing *People v. Herrera*, 96 Ill. App. 3d 851, 855, 422 N.E.2d 95, 98 (1981)). Thus, defendant acquiesced in Lenik's representation of him at the November 13, 2007, pretrial hearing. Defendant has also never objected to Lenik's representation of him at his January 2, 2008, pretrial hearing. Defendant fails to explain how his acquiescence to Lenik's filling in for Welch at some of his pretrial hearings does not show his approval of the practice in general. Accordingly, we find defendant acquiesced with the practice of having Lenik fill in for Welch at his pretrial hearings.

¶ 23 Additionally, even if Lenik's representation of defendant at the October 16, 2007, hearing was unauthorized, defendant has not shown a speedy-trial violation. Welch testified he (1) was not surprised by Lenik's acquiescence to the State's motion to continue based on the lab reports and (2) explained the continuance to defendant after that hearing. As we noted on direct appeal, defendant did not raise an objection to Lenik's acquiescence to the continuance until his direct appeal. *Terry*, No. 4-08-0238, slip order at 16. Defendant even raised a speedy-trial argument in his posttrial motion but did not challenge Lenik's actions on October 16, 2007. Our supreme court has held "a party who does not promptly repudiate an attorney's unauthorized act upon receiving knowledge of such an act has effectively ratified the act." *People v. Bowman*, 138 Ill. 2d 131, 143, 561 N.E.2d 633, 639 (1990). We find defendant has failed to show he promptly repudiated Lenik's acquiescence to the State's motion to continue upon learning of it and thus conclude defendant ratified Lenik's actions. Accordingly, the delay caused by the October 16, 2007, continuance was properly attributed to defendant, and no speedy-trial violation

occurred.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Champaign County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.