

NOTICE

Decision filed 04/15/13. 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.

2013 IL App (5th) 100471-U
NO. 5-10-0471
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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jefferson County.
)	
v.)	No. 02-CF-332
)	
TIMOTHY HUBBARD,)	Honorable
)	Terry H. Gamber,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

- ¶ 1 *Held*: The court cannot consider the motion of the State Appellate Defender to withdraw, and must dismiss the appeal, where there has been no final judgment regarding the defendant's petition for postconviction relief.
- ¶ 2 The defendant, Timothy Hubbard, appeals the circuit court's dismissal of his petition for postconviction relief as well as the circuit court's denial of his motion to reconsider the grant of his postconviction counsel's motion to withdraw. The State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and an extension of time to file briefs, memoranda, or other documents demonstrating why the judgment should not be affirmed and why counsel should not be permitted to withdraw. The defendant has submitted a response. Additionally, this court requested that the State Appellate Defender submit a supplemental brief addressing

whether there has been a final judgment in this case upon which this court may exercise jurisdiction over the appeal. Counsel submitted its supplemental brief. Upon examination of said brief, the entire record, the original brief of the State Appellate Defender, and the defendant's response, we find that we cannot grant counsel's motion to withdraw, but rather, must dismiss this appeal, because there has been no final judgment upon which this court may exercise jurisdiction.

¶ 3 On July 31, 2002, the defendant was charged with aggravated criminal sexual assault pursuant to section 12-14(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-14(a)(2) (West 2002) (now see 720 ILCS 5/11-1.30(a)(2) (West Supp. 2012))). The State added two additional counts of aggravated criminal sexual assault on January 17, 2003. A jury convicted the defendant of all counts, and the defendant was sentenced to 12 years' imprisonment on all counts to run consecutively. The defendant appealed, arguing that he was not properly admonished by the circuit judge pursuant to Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001). This court agreed with the defendant and remanded for compliance. *People v. Hubbard*, No. 5-04-0175 (2005) (unpublished order under Supreme Court Rule 23). Both the State and the defendant agree that the circuit court thereafter complied with Rule 605(a).

¶ 4 On March 15, 2009, the defendant filed a petition for postconviction relief, and on June 6, 2009, the circuit court appointed counsel to assist him. On October 27, 2009, the defendant's counsel filed a motion to withdraw. The defendant filed a motion in opposition to counsel's motion which included, *inter alia*, an argument that counsel had not complied with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). On December 22, 2009, counsel filed a certificate of compliance with Rule 651(c). On July 8, 2010, the circuit court granted counsel's motion to withdraw. The defendant's motion to reconsider was denied on September 16, 2010.

¶ 6 In *People v. Tate*, 2012 IL 112214, ¶¶ 9-10, our supreme court described the procedures to be followed by the circuit court in a postconviction proceeding. "In a noncapital case, a postconviction proceeding contains three stages." *Id.* ¶ 9. "At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or is patently without merit." (Internal quotation marks omitted.) *Id.* (quoting *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). At that point, "[a] petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id.* (citing *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). "If the circuit court does not dismiss the petition as frivolous or *** patently without merit," the second stage begins. (Internal quotation marks omitted.) *Id.* ¶ 10 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2008)). "It is at this point *** where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel." *Id.* (citing 725 ILCS 5/122-4, 122-5, 122-6 (West 2008)). At the second stage, "the circuit court must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.'" *Id.* (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). If no such showing is made, "the petition is dismissed." *Id.* (citing *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). On the other hand, if such a showing is made, "the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing." *Id.* (citing 725 ILCS 5/122-6 (West 2008)).

¶ 7 With regard to dismissal at the second stage, this district stated, in *People v. Volkmar*, that a *sua sponte* dismissal is not proper, and "dismissal can be granted only on the motion of the State." *People v. Volkmar*, 363 Ill. App. 3d 668, 670 (2006). Likewise, the Second District stated that, at the second stage, "the court may rule only upon the State's answer or motion to dismiss." *People v. Starks*, 2012 IL App (2d) 110324, ¶ 23 (citing 725 ILCS 5/122-

5 (West 2010)). Our supreme court has provided that postconviction counsel may move to withdraw from representation where the defendant's claims are frivolous and patently without merit. *People v. Greer*, 212 Ill. 2d 192, 206-11 (2004). However, the Fourth District stated that "[t]he fact that counsel has been granted leave to withdraw does not mean that the postconviction petition is dismissed" and that "the State is required to file an answer or a motion to dismiss." *People v. Greer*, 341 Ill. App. 3d 906, 910 (2003).¹

¶ 8 A second stage dismissal is subject to *de novo* review. *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 37 (citing *People v. Childress*, 191 Ill. 2d 168, 174 (2000)).

¶ 9 In the instant case, the defendant's petition was at the second stage because the court did not dismiss it as frivolous or patently without merit in a timely manner. In fact, the record does not reveal any instance in which the court expressly dismissed the defendant's petition at all, and although the State was present for the hearing on postconviction counsel's motion to withdraw, the record does not reveal any instance in which the State moved to dismiss the petition. The State Appellate Defender points out that, in the record sheet, the judge tracked the language from the Post-Conviction Hearing Act regarding dismissal of a second stage petition: "there are no issues raised which support a substantial denial of [defendant's] constitutional rights at trial." However, this language appears to refer to the basis upon which the circuit court granted counsel's motion to withdraw rather than to the basis for a dismissal, as it preceded the following language: "Accordingly, said motion to

¹The decision of the Fourth District was affirmed by the Illinois Supreme Court in *People v. Greer*, 212 Ill. 2d 192 (2004); however, the court expressed "no opinion on issues not raised by defendant" in the appeal. *Id.* at 212. The defendant's appeal only challenged the circuit court's order granting appointed counsel's motion to withdraw based on lack of merit, claiming that such a withdrawal was not authorized by the Post-Conviction Hearing Act. *Id.* at 195-96.

withdraw as counsel is granted." The court did not orally state that the petition was dismissed, nor did it indicate such in the record sheet. Nor did the court act upon the motion or answer of the State. Because the court did not dismiss the petition upon a motion or answer by the State, and because we agree with *Greer* that granting counsel's motion to withdraw does not automatically dismiss the petition, there has been no dismissal of the defendant's petition in this case.

¶ 10

FINAL JUDGMENT

¶ 11 The next question we must address is whether, in the absence of a dismissal, the grant of a motion to withdraw as postconviction counsel is a final judgment conferring jurisdiction upon this court.

¶ 12 This court generally has jurisdiction only over appeals in which a final judgment has been rendered. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "A final judgment is one which terminates the litigation or disposes of the rights of the parties on the merits." *Mann v. Thomas Place, L.P.*, 2012 IL App (1st) 110625, ¶ 29 (citing *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008) (quoting *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998))). The Post-Conviction Hearing Act provides that the dismissal of a defendant's postconviction petition "is a final judgment." 725 ILCS 5/122-2.1(a)(2) (West 2010). However, it is silent with regard to whether granting postconviction counsel's motion to withdraw constitutes a final judgment.²

¶ 13 Counsel argues that, "[w]hile normal procedure may include a written 'order of dismissal,' the reality is once counsel was allowed to withdraw, and the trial court made the

²As the Illinois Supreme Court noted, the Post-Conviction Hearing Act does not address whether postconviction counsel may withdraw, although the court found that such withdrawal is proper where the defendant's arguments are frivolous or patently without merit. *People v. Greer*, 212 Ill. 2d 192, 211-12 (2004).

necessary finding, there was no issue left pending to litigate."

¶ 14 In *People v. Greer*, the Fourth District affirmed the trial court's grant of counsel's motion to withdraw but reversed and remanded for further proceedings because the court had improperly dismissed the defendant's petition *sua sponte* at the second stage, finding that allowing counsel to withdraw does not result in automatic dismissal of the petition. 341 Ill. App. 3d at 910. This case is different than *Greer* because here, the court never dismissed the defendant's petition. If allowing counsel to withdraw does not mean automatic dismissal, then allowing counsel to withdraw without a dismissal does not constitute a final judgment.

¶ 15 We find *Greer* persuasive, in that allowing counsel to withdraw does not end the litigation. Therefore, we cannot consider the State Appellate Defender's motion to withdraw and must dismiss this appeal for lack of jurisdiction.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is denied. This appeal is dismissed for lack of jurisdiction.

¶ 18 Motion denied; appeal dismissed.