2014 IL App (1st) 122319-U

No. 1-12-2319

FIFTH DIVISION
March 20, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN LOMBARDI, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 03 CR 11291 The Honorable Shelley Sutker-Dermer and Michael J. Howlett, Jr., Judges, presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

Held: Defendant's notice of appeal was sufficient for the court to exercise jurisdiction over this appeal. The dismissal of defendant's postconviction petition is vacated due to denial of defendant's right of self-representation.

¶ 1 Following a bench trial, defendant John Lombardi was convicted of two counts of home invasion, one count of residential burglary, and one count of aggravated battery. Defendant was

ultimately sentenced as a habitual offender to natural life in prison for home invasion and to concurrent sentences of 60 and 10 years, respectively, for the other charges. On direct appeal, this court vacated one count of home invasion but otherwise affirmed the trial court's judgment. *People v. Lombardi*, 1-06-0025 (2008) (unpublished order under Supreme Court Rule 23).

¶ 2 Defendant now appeals from the second-stage dismissal, upon the State's motion, of his petition filed pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122–1 *et seq.* (West 2010)). He contends that the circuit court violated his right to self-representation during the postconviction proceedings by not ruling upon his request to proceed *pro se*. Defendant further contends that the circuit court erred in dismissing his petition as he had made a substantial showing that he was denied his right to effective assistance of trial counsel as a result of his counsel's failure to convey a plea offer. We agree that defendant was denied his right to represent himself during the postconviction proceedings and therefore vacate the dismissal of his petition and remand for further second-stage proceedings.

¶ 3 We only briefly set forth here the facts established at defendant's bench trial as they were more thoroughly developed by this court in our previous order. *Lombardi*, 1-06-0025 (2008) (unpublished order under Supreme Court Rule 23). On May 6, 2003, the complainant, Randy Hughes, discovered the defendant in the Hughes' family home holding a number of their personal items wrapped in Hughes' mother's sweater. Defendant pulled a switchblade knife from his pocket and a struggle ensued. During the struggle, Hughes suffered several cuts from the knife. Defendant fled, but he was ultimately apprehended by the police. Upon his arrest, defendant was found to have blood on his shirt and hands. He was also found to be in possession of the bloody knife and several items taken from the Hughes' home.

¶ 4 On direct appeal, defendant raised the following claims: (1) the State failed to prove that he was guilty of home invasion beyond a reasonable doubt; (2) the trial court erred by "failing to hold the State to its burden of disproving [defendant's] affirmative defense beyond a reasonable doubt"; (3) the trial court impermissibly imposed an extended-term sentence for defendant's aggravated battery conviction; and (4) the trial court improperly convicted defendant of two counts of home invasion where there was only one illegal entry into the victim's home. As noted above, this court affirmed defendant's convictions and sentences, with the exception that the conviction on one count of home invasion was vacated.

¶ 5 Defendant then filed a *pro se* postconviction petition, as well as a motion entitled "Motion to Proceed in Forma Pauperis and for the Appointment of Counsel." Among the many claims raised in his petition, defendant claimed that he was denied effective assistance of counsel where his trial counsel "failed to inform petitioner of State's offer of 50 years plea bargin [*sic*], until after sentencing." In July 2009, the trial court docketed the petition, advanced it to second-stage proceedings, and the office of the Cook County Public Defender was appointed to represent the defendant. Subsequently, the defendant filed a motion entitled "Petitioner's Post-Conviction Motion for Appointment of Counsel other than the Public Defender in alternate [*sic*] Pro-Bono Counsel." That motion was denied on April 29, 2011, and, on that same date, defendant's counsel filed her Rule 651(c) certificate (Ill. S. C. R. 651(c) (eff. Feb. 6, 2013)), without making any amendments to his pleading.

¶ 6 On May 15, 2011, defendant mailed a motion to the circuit court clerk's office entitled "Petitioner's Motion to Proceed Pro-Se with Standby Counsel to assist in the completion of litigation of the pending Post-Conviction Relief Petition, pursuant to 725 ILCS 5/122-4." That motion was stamped "received" by the "Crim. Dept. Dist. 2" on May 24, 2011. Within this

motion, defendant stated that he had repeatedly tried to supplement his postconviction petition through his appointed counsel and that he "has been completely ignored" despite his numerous attempts to contact her through the mail and over the telephone. Defendant indicated his desire to proceed *pro se*, but also asked for the appointment of standby counsel. However, in his request for relief, defendant asked to be allowed to proceed *pro se* with or without standby counsel. Although defendant's case appeared on the call of the trial court on several subsequent dates, this motion was never mentioned and there is no record of it ever being ruled upon.

¶ 7 On January 13, 2012, the State filed a motion to dismiss the postconviction petition. Defendant's counsel did not file a response. On June 27, 2012, after hearing argument on the motion, the trial court granted the motion to dismiss, leading to the instant appeal.

¶ 8 The State responds to the instant claims in two ways. First, the State asserts that this court lacks jurisdiction to consider defendant's claim that he was denied his right to proceed *pro se* due to his failure to include that claim in his notice of appeal. Next, in the event that we find jurisdiction over that claim and reach its merits, the State claims that defendant failed to make a clear and unequivocal waiver of his right to counsel as required by established precedent. Lastly, as to the ineffective assistance of counsel claim, the State asserts that the claim that a plea offer was not communicated to him has not been sufficiently substantiated by affidavit and that defendant has not made a substantial showing that he was prejudiced by counsel's actions.

¶ 9 On the jurisdictional question, we disagree with the State and find that this court does have jurisdiction over the claims raised in this appeal. The defendant's notice of appeal reads as follows, in pertinent part:

> "An appeal is taken from the Order of Judgment described below:
>
> Judgement [*sic*]: Denial of Post-Conviction Relief

Date of Judgment: June 27, 2012"

¶ 10 In support of its argument that this court lacks jurisdiction here, the State relies on Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). Rule 303 is found in Article III, which is entitled "Civil Appeals Rules," and reads, in pertinent part:

> "**(b) Form and Contents of Notice of Appeal.**
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> ***
>
> (2) It shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." (Emphasis in original). Ill. S. Ct. R. 303(b)(2) (eff. Jan. 1, 2015).

¶ 11 The State also relies upon *People v. Smith*, 228 Ill. 2d 95 (2008), for the proposition that a notice of appeal that refers only to a judgment of conviction is insufficient to establish jurisdiction to review a claim regarding a defendant's sentence. As we discuss below, we find the State's reliance on *Smith* unpersuasive, as it is clearly distinguishable from the case at bar.

¶ 12 Article VI of the Illinois Supreme Court Rules is entitled, "Appeals in Criminal Cases, Post-Conviction Cases, & Juvenile Court Proceedings." Appeals from the dismissal of a postconviction petition are governed by Illinois Supreme Court Rule 651(d), which states, "[t]he procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals, as near may be." Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013).

> "In noncapital criminal cases, appeals are perfected by filing a notice of appeal. *In re D.D.*, 212 Ill. 2d 410, 416–17 (2004). The timely filing of a notice of appeal is the only jurisdictional step required to initiate appellate review. *In re D.D.*, 212 Ill. 2d at 417. A reviewing court lacks jurisdiction and is obliged to dismiss an appeal if there is no properly filed notice of appeal. *Smith*, 228 Ill. 2d at 104.

> The purpose of the notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision. *Smith*, 228 Ill. 2d at 104–05. The notice must identify the nature of the order appealed if the appeal is not from a conviction. 210 Ill. 2d R. 606(d). A notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts of judgments specified in the notice. *Smith*, 228 Ill. 2d at 104. The notice is sufficient to confer jurisdiction if, considered as a whole and construed liberally, it fairly and adequately identifies the complained-of judgment. *Smith*, 228 Ill. 2d at 104–05. The failure to comply strictly with the form of the notice is not fatal if the deficiency is nonsubstantive and the appellee is not prejudiced. *Smith*, 228 Ill. 2d at 105." *People v. Lewis*, 234 Ill. 2d 32, 37 (2009).

¶ 13 We find that defendant's notice of appeal, liberally construed and considered as a whole, fairly and adequately sets out the judgment complained of and sufficiently advised the State of the nature of the appeal. Defendant complains that he was not allowed to represent himself during the proceedings on his postconviction petition. His motion seeking the right to proceed *pro se* was allegedly ignored by the trial court and his petition was dismissed before he was ever able to obtain a ruling on it. It is that dismissal order, allegedly entered in violation of his right to counsel, that is the complained-of judgment. The nature of the order, which is other than a conviction, is set forth in the notice as it is described as, "Denial of Post-Conviction Relief." See Ill. S. Ct. R. 606(d) (eff. Dec. 11, 2014). Other than the dismissal order, no other orders were entered that could be listed on the notice. In fact, it is the absence of an order with regard to his motion that defendant complains of, and thus the dismissal order which was entered without defendant being allowed to proceed *pro se* is the only order or judgment that could be listed. It is

also the only order that was final and thus appealable. Additionally, it is the briefs, and not the notice of appeal itself, that specify the precise points to be relied upon for reversal. *People v. Patrick*, 2011 IL 111666, ¶ 26.

¶ 14 The State's reliance on *Smith*, 228 Ill. 2d 95, is misplaced. In *Smith*, on November 10, 2004, the defendant pled guilty to a drug offense, judgment was entered against the defendant, and he was sentenced to 10 years' imprisonment. *Id.* at 98-99. After an unsuccessful petition to withdraw his plea and an unsuccessful direct appeal, defendant filed a "Motion to Correct Sentence," in which he complained that his MSR term was improperly added to his sentence. *Id.* at 99. This motion was denied on February 21, 2006, and the defendant appealed the denial of his "Motion to Correct Sentence." *Id.* at 100-01. His notice of appeal, however, only referred to the November 10, 2004, judgment and did not mention the subsequent order of February 21, 2006, the order from which he was actually appealing. *Id.* at 101. Our supreme court held that the defendant's notice of appeal, no matter how liberally construed, could not be said to have "fairly and adequately set out the judgment complained of—the court's order of February 21, 2006—or the relief sought. The notice not only failed to mention the February 21, 2006, order, it specifically mentioned a different judgment, and only that judgment. This was more than a mere defect in form. The defendant's notice failed to apprise the State of the nature of the appeal." *Id.* at 105. The notice therefore "failed to confer jurisdiction on the appellate court to hear defendant's appeal." *Id.*

¶ 15 The unusual scenario put forth in *Smith*, a notice of appeal citing a judgment entered prior to the date of an order denying a post-judgment motion that was actually the subject of the appeal, is not analogous to the situation presented here. In *Smith*, the notice of appeal could not

be interpreted to encompass an order entered after the date listed on the notice. In the case at bar, the denial of the right to proceed *pro se* led up to the date of the complained-of judgment.

¶ 16 As we find that the defendant's notice of appeal confers jurisdiction on this court to hear his appeal, we now turn to the merits of his claims.

¶ 17 At the outset we note that the State does not contest that the defendant has a statutory right to proceed *pro se* under the Act. To the contrary, the State acknowledges that this court has previously held that a statutory right to proceed *pro se* exists within the Act. See *People v. Gray*, 2013 IL App (1st) 101064. In so holding, this court stated:

> "Section 122–4 of the Act provides:
>
> 'If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, and the petition is not dismissed pursuant to Section 122–2.1, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel. ' 725 ILCS 5/122–4 (West 2010).
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> The Act is clear that the court must appoint counsel for a defendant who (1) wishes to have counsel appointed and so requests, and (2) lacks the means to procure counsel. In other words, the Act grants a defendant the initial decision to invoke the right to counsel, rendering the appointment of counsel mandatory if the defendant invokes the right but does not have the means to employ counsel. While the Act does not expressly contemplate a defendant making a request for counsel and later revoking it, as the State correctly notes, it clearly does not contemplate compelling a defendant who does not want counsel to accept counsel nonetheless. The Act creates a statutory right to counsel (*People v. Perkins*, 229 Ill. 2d 34, 42 (2007)) that the

> statutory language expressly leaves to the defendant-petitioner to invoke at his choosing. We shall not hold that a defendant can choose to proceed *pro se* when he files his postconviction petition but, having chosen at that time to request counsel, is irrevocably bound by that decision throughout the proceedings on his petition. In sum, we find a right to proceed *pro se* under the Act." *Gray*, 2013 IL App (1st) 101064, ¶¶ 21-22.

¶ 18 We find this reasoning persuasive and continue to adhere to the holding in *Gray* that the Act provides a statutory right to proceed *pro se* in proceedings thereunder. We also agree with the State that the above holding obviates the need to consider defendant's claim that he has a constitutional right to proceed *pro se* in his postconviction proceedings. See *People v. Melchor*, 226 Ill. 2d 24, 34 (2007) (appellate court must first consider any nonconstitutional issues raised and reach the constitutional issues only if necessary).

¶ 19 The statutory right to proceed *pro se* under the Act having been established, the State takes the position here that defendant did not unambiguously invoke this right, and, further, that his request was untimely. These are the same arguments that were put forth by the State and rejected by this court in *Gray*. Despite the State's attempt to distinguish *Gray* on a factual basis, we find that it presented a scenario that is remarkably similar to the case at bar.

¶ 20 In *Gray*, the defendant was represented by counsel in postconviction proceedings. *Gray*, 2013 IL App (1st) 101064, ¶ 8. During the proceedings, however, the defendant filed several *pro se* motions to amend his petition. *Id.* ¶¶ 10-13. The State moved to strike the defendant's *pro se* filings as he was represented by counsel. *Id.* ¶ 16. Counsel represented to the court that the defendant had indicated his desire to proceed *pro se*, but went on to suggest that counsel continue to represent the defendant while the court could consider the *pro se* filings. *Id.* ¶ 15.

The court rejected the suggestion of dual representation. *Id.* Additionally, the defendant filed a *pro se* motion asking the court to consider the claims in his *pro se* amendments. *Id.* ¶ 17. He argued that he was raising these issues himself because counsel refused to raise them in a counsel-filed amended petition. *Id.* He also raised a new substantive claim: that his natural life sentence was improper. *Id.* His prayer for relief was that the court consider the claims "or in the alternative allow [him] to proceed *pro se.*" *Id.*

¶ 21 At the hearing on the State's motion to strike, counsel requested that the defendant be brought to court to assert his right to proceed *pro se*. *Gray*, 2013 IL App (1st) 101064, ¶ 18. The court struck the *pro se* filings, noting that counsel had filed his Rule 651(c) certificate indicating that he was ready to proceed "on the nine-year old filing" and characterized counsel's suggestion as a "dilatory tactic" in light of the fact that the petition had been pending since 2001. *Id.* Subsequently, the court granted the State's motion to dismiss the post-conviction petition. *Id*. ¶ 19.

¶ 22 In holding that the defendant in *Gray* was denied his right to self-representation, it was first noted generally that:

> "[t]he right to self-representation is not absolute; that is, making a request or demand to proceed *pro se* does not *ipso facto* mandate that the defendant must be allowed to represent himself. Where a defendant has a right to proceed *pro se,* he must knowingly and intelligently relinquish his right to counsel. *People v. Baez*, 241 Ill. 2d 44, 115–16 (2011). Waiver of counsel must be clear and unequivocal, not ambiguous, so that a defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*. *Id.* at 116. In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the

> defendant truly desires to represent himself and has definitively invoked his right of self-representation. *Id.* We must indulge every reasonable presumption against waiver of the right to counsel. *Id.* The purpose of requiring that a defendant make an unequivocal request to waive counsel is to prevent him from (1) appealing the denial of his right to self-representation or the denial of his right to counsel, and specifically (2) manipulating or abusing the criminal justice system by vacillating between requesting counsel and requesting to proceed *pro se*. *Id.* The determination of whether there has been an intelligent waiver of the right to counsel depends upon the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant. *Id.* We review the trial court's determination for abuse of discretion. *Id.*" *Gray*, 2013 IL App (1st) 101064, ¶ 23.

¶ 23 Based on the above principles, this court found that the trial court had abused its discretion by failing to grant, or even expressly rule upon, defendant's request to proceed *pro se*. *Gray*, 2013 IL App (1st) 101064, ¶ 24. Noting that the request was "arguably contingent upon the preclusion of defendant's preferred course[,]" that being consideration of his *pro se* filings while retaining counsel, we found that this did not render the request ambiguous. *Id.* To the contrary, we noted that the defendant had "made it clear that he wanted to raise his *pro se* claims and would proceed *pro se* if that was the only way to do so." *Id.*

¶ 24 We also found that the defendant's request would not interfere with the orderly schedule of proceedings and should not have been ignored on the basis of timeliness. *Gray*, 2013 IL App (1st) 101064, ¶¶ 25-26 (citing *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 24. "A request to proceed *pro se* may reasonably be rejected where it 'come[s] so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings' or where a defendant

'engages in serious and obstructionist misconduct.' " *Id.* ¶ 25 (quoting *Woodson*, 2011 IL App (4th) 100223, ¶ 24).

¶ 25 In the case before us, the defendant filed his "Petitioner's Motion to Proceed Pro-Se with Standby Counsel to assist in the completion of litigation of the pending Post-Conviction Relief Petition, pursuant to 725 ILCS 5/122-4" in May 2011. In that motion, defendant made it clear that the reasons for filing the motion were that his attempts to persuade his public defender to supplement the claims in his postconviction petition had been ignored and there had been a breakdown in communication between them. Defendant further noted that he was filing this motion after the trial court had denied his previous motion of December 2010 asking for appointment of counsel other than the public defender. Defendant sought to proceed *pro se* and also sought the appointment of standby counsel. However, defendant also acknowledged that such an appointment was within the broad discretion of the court. Importantly, in defendant's prayer for relief, he concluded this motion by asking the court "to consider allowing the petitioner to proceed (pro-se) *with or without standby counsel* and be admonished according to Supreme Court Rule 401, addressing the petitioner personally in open court to finalize the supplements and amendment to his Post-Conviction Relief petition." (Emphasis added).

¶ 26 As in *Gray*, we find that defendant made a clear and unequivocal demand to proceed *pro se* in this postconviction matter. As to the request for standby counsel, the only fair reading of the motion was that defendant made it clear that *with or without standby counsel*, he wanted to proceed *pro se*.

¶ 27 On the question of timeliness, this petition was filed in June 2009. Defendant requested counsel other than the public defender in December of 2010, which request was later denied in April 2011. Defendant responded immediately by filing his "Petitioner's Motion to Proceed Pro-

Se with Standby Counsel to assist in the completion of litigation of the pending Post-Conviction Relief Petition, pursuant to 725 ILCS 5/122-4" on May 11, 2011. At the time defendant filed this last motion, the postconviction proceeding was two years old, and it is clear that defendant diligently attempted to get his additional claims filed throughout the proceeding. The two years that passed here are certainly a far cry from the nine years cited by the trial court in *Gray*. We also note that a Rule 651(c) certificate had been filed in each case. We find the State's attempt to distinguish *Gray* unpersuasive. Defendant's request to proceed *pro se* was not untimely. Accordingly, we find that defendant's Sixth Amendment right to self-representation was denied as a result of the trial court's failure to rule on his request.[1] We therefore vacate the judgment of the trial court dismissing the postconviction petition and remand for further proceedings pursuant to Illinois Supreme Court 401 (eff. July 1, 1984).

¶ 28 Defendant has also raised the claim on appeal that he was denied his right to the ineffective assistance of trial counsel as a result of his counsel's failure to convey a plea offer. As we are remanding this matter for further second-stage proceedings, where it is likely that amended pleadings will be filed, we decline to address this issue as any ruling in that regard would be premature and potentially advisory. See *People v. Manning*, 241 Ill. 2d 319, 350 n1 (2011) (this court refrains from issuing advisory opinions). During the pendency of this appeal, defendant was granted leave to file a supplemental *pro se* brief. In light of the vacatur of the dismissal order, the several additional issues raised in that filing are not considered here.

[1] We do note that it is not clear from the record that the trial court was ever informed of the filing of the motion in question. However, it is clear that it was filed with the circuit court clerk's office in the second municipal district, where his case was pending. The failure of the clerk's office to forward this motion to the judge, if that was the case, certainly cannot inure to the detriment of the defendant's constitutional rights.

¶ 29 The judgment of the circuit court is vacated and this cause is remanded for further proceedings consistent with this opinion.

¶ 30 Vacated and remanded, with directions.