

2015 IL App (2d) 130641-U  
No. 2-13-0641  
Order filed July 2, 2015

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 01-CF-1695
	)	
KENNETH L. OGUREK,	)	Honorable
	)	Blanche H. Fawell,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* Postconviction counsel did not fail to provide reasonable assistance to defendant by not raising appellate counsel's alleged ineffectiveness for failing to raise issue pertaining to defendant's unsuccessful attempt to revoke his waiver of right to counsel before the trial court where defendant validly waived and did not properly re-invoke his right to counsel.

¶ 2 Defendant, Kenneth L. Ogurek, appeals an order of the circuit court of Du Page County dismissing his postconviction petition after the second stage of postconviction proceedings. See *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). The trial court determined that defendant's claim was *res judicata*. *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006) ("[A]ny issues that were

decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are forfeited.”). For the reasons that follow, we affirm.

¶ 3 Our review of a dismissal after the second stage of postconviction proceedings is *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). We review the result to which the trial court came rather than its reasoning. *People v. Johnson*, 208 Ill. 2d 118, 128 (2003). We may affirm on any basis appearing in the record. *People v. Rivera*, 2014 IL App (2d) 120884, ¶ 8. We have previously set forth most of the relevant fact in this case following defendant’s direct appeal (*People v. Ogurek*, 356 Ill. App. 3d 429 (2005)), and we will not restate them here. Any additional facts necessary to resolve this appeal will be discussed in the course of addressing defendant’s argument.

¶ 4 Here, defendant claims that postconviction counsel did not provide him with an acceptable level of assistance. Of course, during postconviction proceedings, a defendant no longer has a constitutional right to the assistance of an attorney; rather, the right to counsel during such proceedings is statutory in nature. *People v. Owens*, 139 Ill. 2d 351, 364 (1990). Pursuant to the Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), counsel is required to provide a reasonable level of assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 5 Defendant contends that postconviction counsel should have raised appellate counsel’s alleged ineffectiveness. *Strickland v. Washington*, 466 U.S. 668 (1984), applies to proceedings on direct appeal. *People v. Pecoraro*, 175 Ill. 2d 294, 333 (2000). To prevail on this claim, defendant must demonstrate that counsel’s failure to raise an issue was objectively unreasonable and that he suffered prejudiced as a result. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). It is well settled that “[a]ppellate counsel is not obligated to brief every conceivable issue on appeal,

and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Haynes*, 192 Ill. 2d 437, 476 (2000). A defendant suffers no prejudice when counsel fails to raise a meritless issue. *Id.*

¶ 6 Defendant contends that postconviction counsel should have raised appellate counsel's failure to raise the issue of whether the trial court forced defendant to choose between proceeding *pro se* or being represented by an attorney with a conflict of interest. Pertinent here, defendant validly waived his right to counsel, as he was dissatisfied with the representation he was receiving from his attorney. Subsequently, the trial court appointed standby counsel to assist defendant. The court told defendant that it would not be the same attorney who represented him previously. However, that attorney was present, and she informed the trial court that she would be assigned as standby counsel unless the trial court ordered differently. The trial court then stated: "That's fine. I find a conflict, and your office is appointed as standby counsel, but only as standby counsel." Another attorney was appointed standby counsel from the Public Defender's officer.

¶ 7 On the morning of the trial, defendant requested that the trial court appoint the standby attorney as counsel and to allow him to take over the case. The trial court told defendant that if it were to re-appoint counsel, it would be the Public Defender, which meant that his original attorney "would probably come back on the case." Defendant's standby attorney indicated that he was not prepared to take over the case. The court asked whether defendant was asking that counsel be re-appointed. It emphasized that who was assigned to represent defendant would be a decision for the Public Defender, and it could be his original attorney, standby counsel, or someone else. The court then asked, "Knowing that it may very well be [your original attorney]

again should I choose to re-appoint counsel, are you asking for re-appointment of counsel.” Defendant replied, “Not if I’m going to get a chance to get [my original attorney], no.” The trial court then ruled that defendant was asking for counsel of his choice rather than simply for the re-appointment of counsel. It also ruled that defendant’s request was untimely. The court later observed, “[W]e are moments away from bringing a jury up here and then the defendant made this request.”

¶ 8 Defendant contends that the trial court erred when it forced him to choose between proceeding *pro se* and accepting representation from the Public Defender, which might have been his original attorney with whom the trial court found he had a conflict. This argument is precluded by the resolution of certain issues in defendant’s first appeal in this matter. In *People v. Ogurek*, 356 Ill. App. 3d 429 (2005). First, we note that, during his direct appeal, defendant asserted, but did not develop the argument, that his waiver of counsel was invalid. *Id.* at 433-34. Claims that could have been raised, but were not, are *res judicata*. *People v. Shaw*, 386 Ill. App. 3d 704, 708 (2008). Thus, it is clear that defendant could have raised it; quite simply, all he would have had to do is develop the argument. As such, he can no longer challenge his initial waiver of counsel. Second, the trial court ruled that defendant’s request for the assistance of an attorney (albeit one of his choosing) was untimely, *Id.* at 436. We agreed with the trial court. *Id.* at 437. As such, this issue was decided on direct appeal and is therefore also *res judicata*. Following a proper waiver of the right to counsel, an untimely attempt to revoke that waiver may be denied. See *People v. Pratt*, 391 Ill. App. 3d 45, 57 (2009); *People v. Palmer*, 382 Ill. App. 3d 1151, 1163 (2008). Having validly waived and failed to properly re-invoke his right to counsel, how the trial court handled defendant’s untimely request is not material. That is, even if we were to accept defendant’s argument that the trial court forced him to choose between no

counsel and an attorney with a conflict, we would affirm nevertheless, as defendant's attempt to revoke his waiver of counsel was untimely and thus ineffective.

¶ 9 Defendant counters that, following his request for standby counsel to take over his case, "the trial court was clearly prepared to appoint counsel as long as [defendant] was willing to accept representation by [his original attorney] whom, presumably unbeknownst to the judge, had previously been found to have a conflict with [defendant]." We fail to see the relevance of this assertion. First, we review the result to which the trial court came, not its reasoning. *Johnson*, 208 Ill. 2d at 128. That defendant validly waived his right to counsel and did not re-invoke it in a timely manner is sufficient support for the result at which the trial court arrived. Second, defendant cites nothing to establish that the trial court's willingness to re-appoint counsel under appropriate circumstances somehow restored his previously waived right to counsel, which is sufficient to forfeit the issue. *People v. Ward*, 215 Ill. 2d 317, 331-32 (2005).

¶ 10 Defendant also contends that rules of waiver are relaxed when "the alleged waiver stems from a claim of ineffective assistance of appellate counsel." *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007). We have no quarrel with this proposition. Nevertheless, a defendant must still identify a meritorious issue that appellate counsel failed to raise, for failing to raise an issue that lacks merit does not prejudice a defendant. *Haynes*, 192 Ill. 2d at 476. Defendant has not done so here.

¶ 11 In light of the foregoing, we hold that postconviction counsel did not fail to provide reasonable assistance to defendant for not raising appellate counsel's purported ineffectiveness. Therefore, the judgment of the circuit court of Du Page County dismissing defendant's postconviction petition is affirmed.

¶ 12 Affirmed.