2015 IL App (4th) 130351-U

NO. 4-13-0351

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 4, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WILLIE JAMES CRAWFORD,	)	No. 08CF713
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Drazewski,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding where defendant elected to dismiss his court-appointed attorney and proceed *pro se* at the second stage of his postconviction proceedings, the trial court was not required to admonish defendant of his right to counsel when his amended petition proceeded to a third-stage evidentiary hearing.

¶ 2 On October 21, 2011, defendant, Willie James Crawford, filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)), alleging he had been deprived of the effective assistance of counsel in five regards. The trial court failed to summarily dismiss defendant's petition within 90 days and Assistant Public Defender W. Keith Davis was appointed to represent defendant. On August 7, 2012, Davis filed a motion to withdraw, alleging all five of defendant's claims were meritless. On August 29, 2012, defendant elected to proceed *pro se* and the trial court allowed Davis to withdraw.

¶ 3 On September 6, 2012, defendant filed a supplemental claim on his petition for postconviction relief. On October 1, 2012, the State filed a motion to dismiss, alleging defendant's petition was meritless. At a hearing on December 27, 2012, the trial court dismissed defendant's petition with regard to the initial five claims but allowed the supplemental claim to proceed to a third-stage evidentiary hearing. On April 23, 2013, at the conclusion of the evidentiary hearing, the trial court denied defendant's postconviction petition. On April 29, 2013, defendant filed a notice of appeal. The supreme court issued a supervisory order directing this court to allow defendant's notice of appeal to stand as a valid appeal from both the trial court's December 27, 2012, dismissal and its April 23, 2013, denial of defendant's postconviction petition. On appeal, defendant argues the trial court erred by not again giving him the option to have counsel reappointed when his supplemental claim advanced to a third-stage evidentiary hearing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On June 24, 2008, the State charged defendant by information with one count of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2006)). As a result of his extensive criminal history, defendant was subject to Class X sentencing. On November 17, 2008, defendant pleaded guilty in exchange for the State's dismissal of all charges in a consolidated traffic case. On January 23, 2009, the trial court sentenced defendant to 14 years in the Illinois Department of Corrections.

¶ 6 On January 29, 2009, defendant's attorney, Harvey Welch, filed a motion to reconsider the sentence. While his motion was pending, defendant wrote a letter to the trial court stating his lawyer had told him the court would consider giving him drug court or, in the alternative, no more than seven years' imprisonment. He further asserted the State had "asked

for" nine years, but his lawyer told him nine years was too much time. On April 29, 2009, as a result of defendant's letter, the court terminated Welch's representation and appointed Assistant Public Defender James Tusek. On June 19, 2009, Tusek filed an amended motion to reconsider the sentence. The trial court denied the motion, defendant filed a direct appeal, and on December 28, 2010, this court affirmed (*People v. Crawford*, No. 4-09-0509 (2010) (unpublished order under Supreme Court Rule 23)).

¶ 7 On October 21, 2011, defendant filed a *pro se* postconviction petition, alleging five claims of ineffective assistance of counsel. Defendant also filed a motion for appointment of counsel and an application to sue or defend as a poor person. On March 22, 2012, the trial court appointed Davis to represent defendant in his postconviction proceedings.

¶ 8 On July 30, 2012, Davis informed the trial court he had spoken with defendant and would be filing a motion to withdraw because he believed defendant's petition was meritless. Addressing defendant, the court explained,

> "You may be heard with respect to that motion, along with the [S]tate upon that motion, and then I'll make a determination on that date as to what I would rule as far as the motion is concerned. If, if, for example, I would deny his motion, then he would remain as your court-appointed attorney. If I would grant his motion, then you don't have the right to pick who your attorney is because although you're indigent and entitled to court-appointed counsel, that would mean that Mr. Davis, if I went with that option, would be released or relieved of his responsibilities. However, you would

be able to go ahead and proceed on your own, that being [*pro se*], arguing the motion if I were to grant his motion."

Defendant stated he understood.

¶ 9 On August 2, 2012, defendant filed a document titled "Objection" with the trial court. The text of that document is as follows.

"NOW Comes Petitioner Willie Crawford, pro,se., and respectfully object to any Court order's, that require and/or allow Court appointed Counsel to file any motions and/or petition to Amend or Supplements, that change or alter the Petitioner's pro,se., petition for Post-Convcition Relief filed October 21, 2011.

The Petitioner do not need or want Court appointed Counsel to *** file any motion and/or petitions to Amend or Supplement, that change, alter, or result in the Petitioner's pro,se., issues and arguement being waived.

WHEREFORE, Petitioner pray this Honorable Court will deny any motion and/or petitions to Amend or Supplement, that change or alter the Petitioner's pro,se., issues and arguement."

¶ 10 On August 17, 2012, Davis filed his motion to withdraw.

¶ 11 On August 29, 2012, a hearing was held on Davis's motion, and the following exchange occurred:

"THE COURT: Okay. Now understanding what is contained within the motion, what is your position as to the request that is being made by Mr. Davis?

THE DEFENDANT: Well, my position is I believe I do have merit on my post. Mr. Davis, in his motion he talked about me pleading guilty. Under the [Act], as I understood it, was about constitutional rights violation[s].

THE COURT: Okay. And that's exactly what [postconviction] petition[s] must concern. *** [D]o you understand that you don't have the right to who you get to choose as your attorney, just that you're entitled to have an attorney represent you in this type of a proceeding?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that you have the right, if you desire, to go ahead and represent yourself, to appear what's called [*pro se*]?

THE DEFENDANT: Yes, sir.

THE COURT: Knowing, then, what Mr. Davis thinks about your petition, not just because—and I'm not invading attorney/client privilege, are you aware, that being what he's represented in his motion in that he doesn't believe it has merit, you do [*sic*]? Is it your request, that's a question, not a statement, is it your request that you be allowed to represent yourself in this matter? I can't appoint you another lawyer is what I'm telling you. You have either Mr. Davis or no lawyer, but that is what I'm asking at this time?

THE DEFENDANT: I'll represent myself.

THE COURT: So you choose to represent yourself? I don't want you to feel like I'm talking you into this. What I'm trying to let you know is what options are available and I want to make sure you understand what's there so you can make a knowing and voluntary choice. So given the choice between having Mr. Davis representing you as appointed counsel or representing yourself, are you indicating to me that you would prefer to represent yourself?

THE DEFENDANT: Your Honor, Mr. Davis, I'm getting the understanding is [*sic*] he's not going to represent me to the best, the way he—the way he's explained it to me.

THE COURT: You don't have to give me your rational [*sic*], although it's good, because on the record it establishes what your thought process is to go ahead and establish how it is or why it is that you have elected to represent yourself as opposed to me suggesting that maybe that's what you'd want to do, but what you're telling me, then, Mr. Crawford, is you've weighed what options, what pros and cons there are if you represent yourself versus if you had Mr. Davis represent you, and it's your decision, then, that you would be representing yourself. Is that correct?

THE DEFENDANT: Yes.

THE COURT: So you wouldn't have any objection, then, as to the one component of his motion where he was asking to be allowed to withdraw as your attorney in this case?

THE DEFENDANT: No, I would not."

The court then noted defendant had elected to proceed *pro se* and granted Davis's motion to withdraw.

¶ 12 On September 6, 2012, defendant filed a *pro se* supplemental issue for postconviction relief, asserting an additional claim of ineffective assistance of counsel. The new claim specifically alleged the State had offered him a plea of nine years and his attorney told him nine years was "to [*sic*] much time," because if he took an open plea, the court would only give him six or seven years.

¶ 13 On October 1, 2012, the State filed a motion to dismiss defendant's postconviction petition. On December 19, 2012, defendant filed a *pro se* answer to the State's motion to dismiss. At a hearing on December 27, 2012, the trial court dismissed defendant's petition with regard to the five original claims but advanced the supplemental claim to a third-stage evidentiary hearing. In doing so, the court stated defendant's supplemental claim contained allegations outside the record and it was improper to resolve factual issues at the second stage. Additionally, the court explained this court's order affirming defendant's conviction (No. 4-09-0509) was entered prior to *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376 (2012), where the Supreme Court found a postconviction petitioner had been prejudiced by his trial counsel's ineffective assistance in advising him to reject a plea offer. Thus, the trial court explained it felt it would be more appropriate to resolve the issue following an evidentiary hearing.

¶ 14 On February 15, 2013, defendant's third-stage evidentiary hearing commenced. The trial court began the hearing by noting defendant had previously elected to proceed *pro se*. The court then heard testimony from defendant's ex-girlfriend, Corine Grandberry, and mother, Geneva Crawford. Both Corine and Geneva testified they heard Welch tell defendant he would receive a six-year sentence if he pleaded guilty.

¶ 15 On April 23, 2013, the evidentiary hearing continued and defendant testified on his own behalf. Defendant stated the State had offered him a plea of nine years. He explained he did not accept the nine-year offer because Welch told him it was too much time for such a small amount of drugs. He further stated Welch had told him the nine-year offer was "not there" at the time he agreed to an open plea, and he was "wasting time" because he would not receive a sentence of more than six or seven years.

¶ 16 Welch was also called to testify. Welch stated he never told defendant he would receive a six-year sentence, nor did he ever advise him to reject a plea offer. Welch explained he may have told defendant he thought the State's offers were too high but maintained he consistently told defendant it was his decision whether to accept any of the State's offers.

¶ 17 At the conclusion of the April 23, 2013, hearing, the trial court denied defendant's postconviction petition. It explained, after hearing all the evidence, defendant's supplemental claim did not fall under *Lafler* and was "merely a fanciful argument not supported by the record." The court further concluded it would have been "fully and adequately appropriate" for it to have dismissed the claim without a third-stage hearing, as the issue had already been fully addressed in this court's December 2010 order (No. 4-09-0509).

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the trial court erred when it failed to again give him the option to have counsel reappointed when his postconviction petition proceeded to a third-stage evidentiary hearing. Specifically, defendant asserts he was entitled to the assistance of counsel at the third stage because his supplemental claim—the claim the trial court advanced to an evidentiary hearing—was added to his petition after Davis withdrew from representation. He contends he satisfied the requirements for appointment of counsel at the third stage because (1) he was without counsel and without means to procure counsel; (2) he had requested that counsel be appointed to assist him; and (3) his petition had not been dismissed pursuant to section 122-2.1 of the Act. See 725 ILCS 5/122-4 (West 2010). The State argues defendant was not entitled to have counsel reappointed for the third stage of his postconviction proceedings because he voluntarily relinquished his right to counsel at the second stage. The State maintains defendant's argument ignores the fact he had been appointed counsel under the Act and had elected to dismiss him. We agree with the State.

¶ 21 A. Defendant Voluntarily Relinquished His Statutory Right to Counsel

¶ 22 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). Thus, "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." *People v. Gray*, 2013 IL App (1st) 101064, ¶ 22, 986 N.E.2d 142. Nonetheless, a defendant who requests counsel at the time he files his postconviction petition is not "irrevocably

bound by that decision." *Id.* "As long as the defendant knowingly and intelligently relinquishes his right to counsel, and his waiver is clear and unequivocal, not ambiguous, the circuit court may allow him to proceed *pro se*." *People v. Heard*, 2014 IL App (4th) 120833, ¶ 10, 8 N.E.3d 447; 725 ILCS 5/122-4 (West 2010). "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." *People v. Baez*, 241 Ill. 2d 44, 116, 946 N.E.2d 359, 401 (2011).

¶ 23 Defendant argues his self-representation arose not from a true desire to represent himself, but rather, Davis's decision to withdraw from representation. He contends he was given "no choice at all" when he elected to proceed *pro se* because he was forced to choose between representing himself and being represented by an attorney who had already expressed a desire not to represent him. We disagree such a scenario renders a defendant's decision to proceed *pro se* involuntary.

¶ 24 Any defendant who has filed a meritless petition and has been appointed counsel pursuant to the Act will inevitably find himself in the position where his court-appointed attorney is seeking to withdraw. However, nothing about the situation itself requires or forces a defendant to voluntarily relinquish his right to counsel. The record in this case shows the trial court carefully advised defendant of the possible outcomes regarding Davis's motion. Most notably, the court explained Davis would continue to represent defendant if the court denied his motion to withdraw.

¶ 25 Three days after Davis informed the court of his intention to file his motion to withdraw, defendant filed an "Objection" with the court. On appeal, defendant claims he objected only to having counsel amend his petition in a way that would waive any of his *pro se*

claims. He claims he had no objection to counsel developing the issues raised in his *pro se* petition, adding issues to his petition, or representing him in hearings to articulate the issues raised in his petition. We find this argument disingenuous. The record shows defendant's "Objection" directly requested the trial court deny any motion Davis filed which changed or altered his *pro se* petition in any way. While we recognize the trial court did not directly rule on defendant's "Objection," it did carefully advise defendant of his options going forward at the hearing on Davis's motion to withdraw.

¶ 26 At the hearing on Davis's motion to withdraw, defendant stated he understood he was entitled to have an attorney represent him in postconviction proceedings. He also stated he understood he had the right to represent himself. The trial court specifically asked defendant, "Is it your request, that's a question, not a statement, is it your request that you be allowed to represent yourself in this matter?," to which defendant responded, "I'll represent myself." To ensure defendant was knowingly relinquishing his right to counsel, the trial court continued:

> "THE COURT: So you choose to represent yourself? I don't want you to feel like I'm talking you into this. *What I'm trying to let you know is what options are available and I want to make sure you understand what's there so you can make a knowing and voluntary choice.* So given the choice between having Mr. Davis representing you as appointed counsel or representing yourself, are you indicating to me that you would prefer to represent yourself?

THE DEFENDANT: Your Honor, Mr. Davis, I'm getting the understanding is [*sic*] he's not going to represent me to the best, the way he—the way he's explained it to me.

THE COURT: You don't have to give me your rational [*sic*], although it's good, because on the record it establishes what your thought process is to go ahead and establish how it is or why it is that you have elected to represent yourself as opposed to me suggesting that maybe that's what you'd want to do, but what you're telling me, then, Mr. Crawford, is you've weighed what options, what pros and cons there are if you represent yourself versus if you had Mr. Davis represent you, and it's your decision, then, that you would be representing yourself. Is that correct?

THE DEFENDANT: Yes.

THE COURT: So you wouldn't have any objection, then, as to the one component of his motion where he was asking to be allowed to withdraw as your attorney in this case?

THE DEFENDANT: No, I would not." (Emphasis added.)

Based on the record before us, we find defendant clearly and unequivocally relinquished his right to counsel under the Act. Defendant stated multiple times he would rather represent himself, and he had no objection to Davis's withdrawal from representation. His dismissal of Davis because he disagreed with him regarding the merit of his postconviction claims does not render his relinquishment any less voluntary.

¶ 27 B. The Trial Court Was Not Required To Admonish Defendant of His Right to Counsel Under the Act

¶ 28 Defendant argues, even if we view his conduct as a relinquishment of his right to the assistance of counsel, he was entitled to have counsel reappointed at his third-stage evidentiary hearing because his relinquishment occurred before he filed, and the trial court accepted, his supplemental claim. He claims he "never told the court that he wanted to proceed *pro se* on the supplemental issue during the third stage," and "the court's acceptance of the supplemental issue for third-stage proceedings was a significant change in the circumstances," warranting inquiry into whether he wanted the assistance of counsel for that claim. To support this proposition, defendant cites *People v. Simpson*, 172 Ill. 2d 117, 138, 665 N.E.2d 1228, 1239 (1996), where the Illinois Supreme Court held a criminal defendant must be readmonished of his right to counsel despite a previous waiver if there has been a significant change in circumstances. We find defendant's reliance on *Simpson* misplaced.

¶ 29 The right to assistance of counsel discussed in *Simpson* was the constitutional right to trial counsel, as provided for in the sixth amendment. *Id.* at 132, 665 N.E.2d at 1237; U.S. Const., amend. VI. As we have long recognized, "[t]here is no corresponding constitutional right to effective assistance of postconviction counsel." *People v. Hardin*, 217 Ill. 2d 289, 299, 840 N.E.2d 1205, 1212 (2005). The right to assistance of counsel in postconviction proceedings is "a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the [Act]." *Id.*

¶ 30 "[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley v. Cochran*, 369 U.S. 506, 513 (1962). However, the right to counsel under the Act depends entirely upon an indigent petitioner's request for assistance. 725 ILCS 5/122-4 (West 2010). As our supreme court explained in *People v. Owens*, 139 Ill. 2d 351, 364-65, 564 N.E.2d 1184, 1189-90 (1990):

> "This distinction is rational, because trial counsel plays a different role than counsel in post-conviction proceedings. [Citation.] At trial, counsel acts as a shield to protect defendants from being 'haled into court' by the State and stripped of their presumption of innocence. [Citation.] Post-conviction petitioners, however, have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions."

¶ 31 Illinois Supreme Court Rule 401(a)(3) (eff. July 1, 1984) requires the trial court to advise a criminal defendant of his right to counsel, but there is no corresponding rule regarding admonishments in the postconviction realm. We disagree with defendant's contention he should have been "readmonished" of his right to counsel before his supplemental claim proceeded to the third stage. Nothing in the statutory language of the Act requires the trial court to ask a petitioner if he would like to be appointed counsel in the first instance, let alone after he has been appointed counsel and elected to dismiss him.

¶ 32 We refuse to construe defendant's initial motion for appointment of counsel as a continuing request. Defendant was appointed counsel pursuant to the Act and then elected to represent himself. From that point forward, he never indicated he wanted the assistance of counsel. Accordingly, we need not address whether the language of the Act supports appointment of new counsel on a supplemental issue filed after appointed counsel has withdrawn. The trial court's judgment is affirmed.

¶ 33 III. CONCLUSION

¶ 34 We affirm the trial court's denial of defendant's postconviction petition. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 35 Affirmed.