

2016 IL App (1st) 133101-U

FIFTH DIVISION  
December 9, 2016

No. 1-13-3101

**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  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CH 15769
	)	
JAMES SCOTT,	)	The Honorable
	)	Clayton Crane,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.

Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The order dismissing the defendant's *pro se* postconviction petition was vacated where the defendant's request to proceed *pro se* was never ruled on by the circuit court. The case was remanded for a hearing to determine if the defendant's waiver of his statutory right to counsel was made intelligently and knowingly.

¶ 2 The defendant, James Scott, appeals the order of the circuit court of Cook County granting the State's motion to dismiss his petition at the second stage of postconviction proceedings. On appeal, the defendant contends that: (1) the circuit court erred when it failed to rule on the defendant's motion to represent himself; (2) he made a substantial showing that his constitutional right to the effective assistance of trial counsel was violated; and (3) postconviction counsel failed to provide him with a reasonable level of representation in violation of Supreme Court Rule 651(c) (eff. Feb. 6, 2016). Since the first issue is dispositive of this appeal, we do not address the second and third issues.

**¶ 3 BACKGROUND**

¶ 4 In 2004, a jury convicted the defendant of the first degree murder of Chicago police officer John Knight and the attempted first degree murder of his partner, Chicago police officer James Butler. The State sought the death penalty. Negotiations between the State and the defendant's attorneys resulted in the defendant's guilty plea to the unrelated first degree murder of Lorenzo Aldridge in exchange for a sentence of life imprisonment without parole in both the Knight and the Aldridge cases. Under the terms of the written plea agreement, the defendant waived any error in connection with his trial in the Knight case and all of his appeal rights, including his right to postconviction relief. In the event the defendant violated the plea

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agreement by seeking appellate review or postconviction relief, the State's Attorney could move to vacate the plea agreement and prosecute the defendant for the Aldridge murder or seek to have the defendant resentenced.

¶ 5 The factual basis for the guilty plea included the defendant's confession to the Aldridge murder, and the proposed testimony of Terrence Battle that the defendant admitted to him that he shot Mr. Aldridge and the proposed testimony of Lilia Porter that she overheard the defendant admit to Mr. Battle that he shot Mr. Aldridge. The trial court accepted the defendant's guilty plea and sentenced him to life imprisonment without the possibility of parole in both cases.

¶ 6 After the defendant's motion to withdraw his guilty plea was denied by the trial court, he filed a notice of appeal. This court granted the appellate defender's motion to withdraw as counsel on appeal. See *People v. Scott*, Nos. 1-04-1994 & 1-04-2634 cons. (2006).

#### ¶ 7 FIRST STAGE POSTCONVICTION PROCEEDINGS

¶ 8 Pertinent to this appeal, on December 31, 2007, the defendant filed a petition for relief pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2006)). *Inter alia*, the defendant alleged a claim of actual innocence based on the existence of affidavits by Mr. Battle and Ms. Porter recanting their prior statements and a claim of ineffective assistance of trial counsel whom he alleged withheld the witnesses' recantations until after the defendant moved to withdraw his guilty plea. The circuit court summarily dismissed the petition, and the defendant appealed to this court.

¶ 9 This court reversed the summary dismissal and remanded the case for second-stage postconviction proceedings. We found that the defendant's claim of actual innocence had an

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arguable basis in his factual allegations that he was unaware the witnesses had recanted their statements against him, that there was no physical evidence connecting him to Mr. Aldridge's murder, that his confession was coerced and that a statement by a "Mr. Farmer," the only eyewitness to the murder, contradicted the facts contained in the defendant's "coerced" confession. While the defendant did not attach copies of the witnesses' affidavits to his petition, we found that "he satisfied the requirements of section 122-2 by attaching a copy of the letter he sent to trial counsel requesting the affidavits of Mr. Battle and Ms. Porter." *Scott*, order at 12; see 725 ILCS 5/122-2 (West 2006) (requiring the defendant to attach the supporting evidence or explain its absence).

¶ 10 We further found that the defendant's actual innocence claim had an arguable legal basis in that the witnesses' statements were used to corroborate the defendant's confession to Mr. Aldridge's murder, and at the time of his guilty plea, the defendant had no reason to inquire whether the witnesses had in fact recanted their statements. *Scott*, order at 13.

¶ 11 Since the defendant's actual innocence claim had an arguable basis in fact and law, his postconviction petition was not subject to summary dismissal. *Scott*, order at 13. The case was remanded to the circuit court for second-stage proceedings and the appointment of counsel. Finally, we did not reach the merits of the defendant's claim of ineffective assistance of trial counsel and the State's argument that the defendant had waived his right to postconviction relief stating that "[w]e believe these matters are better addressed at the next stage of postconviction proceedings where the State can move to dismiss the petition based on the plea agreement, and

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the defendant will have the benefit of counsel in addressing the State's argument." *Scott*, order at 15.

¶ 12 SECOND STAGE POSTCONVICTION PROCEEDINGS

¶ 13 On remand, the public defender was appointed to represent the defendant. On July 20, 2011, assistant public defender Michael Davidson (APD Davidson) advised the circuit court that he was in the process of locating Mr. Battle and Ms. Porter to obtain their affidavits prior to drafting an amended postconviction petition. On February 2, 2012, APD Davidson wrote to the defendant advising him that he had requested trial counsel's file so he could obtain the witnesses' recantation letters, but the file could not be located. He advised the defendant that he would continue to search for the letters and if necessary attempt to locate the witnesses' to obtain replacement statements. On May 20, 2012, the circuit court was informed by a different APD that APD Davidson "apparently" had obtained the documents he had been trying to locate.

¶ 14 On July 26, 2012, APD Bruce Landrum advised the circuit court that APD Davidson had retired, and APD Landrum now represented the defendant. On December 13, 2012, APD Landrum advised the court that he was waiting for his investigator to obtain Mr. Battle's and Ms. Porter's affidavits.

¶ 15 On February 21, 2013, APD Landrum reported to the trial court that Mr. Battle was deceased and that his investigator just obtained a new address for "Valerie" Porter but had been unable to contact her. On April 25, 2013, APD Landrum filed his Rule 651(c) certificate but did not file a supplemental petition. Attached to his Rule 651(c) certificate was a summary of his investigator's attempts to locate Ms. Porter and the recantation affidavit by her or to present her

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as a witness. Also attached to the certificate was a typed summary of a December 8, 2000 interview of Ms. Porter by an investigator from the public defender's office. According to the summary, Ms. Porter told the investigator that she was never in the bedroom with the defendant and Mr. Battle, and neither Laward Cooper, her uncle and the co-defendant, nor the defendant admitted killing Mr. Aldridge. Mr. Battle had begged her to confirm what he had told police so that he would not go to jail.

¶ 16 After APD Landrum informed the defendant that he would not be supplementing the *pro se* petition, the defendant filed a *pro se* supplement to his postconviction petition on May 30, 2013. *Inter alia*, the defendant alleged that APD Landrum told him that the State had provided APD Landrum with documents in which Ms. Porter recanted her "recantation." The defendant asserted that this was proof that the recantations existed. Therefore, he argued his plea was involuntary, and his waiver of rights of appeal and postconviction relief was not valid. The defendant also challenged APD Landrum's reasons for not supplementing the defendant's *pro se* petition: (1) the defendant's actual innocence claim would fail based on his confession, and (2) this court did not remand the case for consideration of his claim of ineffectiveness of counsel.

¶ 17 The defendant attached a number of exhibits to his supplemental *pro se* petition, including: this court's order remanding his case, correspondence with the various APDs who had represented him, and copies of Ms. Porter's January 4, 1998, statement to police and her January 15, 1999, grand jury testimony, in which she stated that she heard the defendant admit to Mr. Battle that he shot Mr. Aldridge. On the front page of the copy of the grand jury transcript, appears a signed handwritten statement dated December 28, 2012, purported to be by Ms. Porter

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in which she states that she read the grand jury transcript, that it was “truly accurate” and that “I heard James Scott say he shot “ ‘LA.’ ”

¶ 18 On June 20, 2013, the State filed a motion to dismiss the defendant’s postconviction petition. On August 16, 2013, the defendant’s *pro se* reply was marked “received” by the circuit court clerk’s office. In his reply, the defendant alleged that his trial attorney, Michael Mayfield, told him that he had obtained the recantation affidavits of Mr. Battle and Ms. Porter. In any event, the fact that the public defender’s office lost the trial file was not the fault of the defendant. Since APD Landrum refused to advocate for him, the defendant requested the appointment of outside counsel to represent him or allow him to represent himself at the second-stage hearing.

¶ 19 On August 22, 2013, the circuit court held a hearing on the State’s motion to dismiss. The State pointed out that in remanding this case to the second stage, this court relied on the defendant’s allegation that in affidavits, Mr. Battle and Ms. Porter recanted their statements implicating the defendant in Mr. Aldridge’s murder. The State maintained that no recantation affidavits existed. What did exist, according to the State, were summaries of statements made by Mr. Battle and Ms. Porter during interviews on December 8, 2000 with the public defender’s investigator.<sup>1</sup> The summaries were neither signed nor notarized, and there was no affidavit from the investigator as to the truth and accuracy of the summaries. Moreover, in a handwritten statement dated December 28, 2012, at the bottom of the summary, Ms. Porter stated that she did

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<sup>1</sup> We were unable to locate the investigator’s summary of the December 8, 2000 interview with Terrance Battle in the record on appeal.

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“not recall this interview. I overheard James Scott talking to Terry and say he shot LA” and followed by her signature.

¶ 20 The State maintained that the proposed testimony of Mr. Battle and Ms. Porter was only part of the basis for the defendant’s guilty plea, which also included the defendant’s detailed confession to the murder. The State further argued that nothing in the record suggested that the defendant’s plea of guilty was involuntary, and therefore the terms of the plea agreement barred the defendant from seeking appellate and postconviction relief.

¶ 21 The State then argued that the defendant could not establish his claim of ineffective assistance of counsel since neither Mr. Battle’s nor Ms. Porter’s 2008 statements was a true recantation and knowing of their existence would not have, in all probability, changed the defendant’s decision to plead guilty to Mr. Aldridge’s murder. As to the actual innocence claim, the State argued that the defendant could not establish that the summaries were new evidence. Moreover, they were not material: Mr. Battle was deceased, and the defendant confessed to the murder. In addition, Mr. Cooper, having served his sentence for the Aldridge murder, could be called to testify. Even if Mr. Cooper chose to testify that the defendant was not involved in Mr. Aldridge’s murder, he was subject to impeachment by his prior statement implicating the defendant in the murder.

¶ 22 After ADP Landrum informed the circuit court that he was resting on the defendant’s *pro se* petition, the court granted the State’s motion to dismiss the *pro se* petition. Addressing the actual innocence claim in the *pro se* petition, the circuit court found that no recantation affidavits existed. Mr. Battle’s and Ms. Porter’s statements in the summaries were not affidavits, and did

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not constitute recantations of their statements implicating the defendant in the Aldridge murder.

As to the ineffective assistance of counsel claim, the court found that there was overwhelming evidence to support the defendant's guilty plea.

¶ 23 The defendant filed a timely notice of appeal from the circuit court's order dismissing his *pro se* postconviction petition.

#### ¶ 24 ANALYSIS

¶ 25 The defendant contends that the circuit court erred when it failed to rule on his request to represent himself at the second-stage hearing.

¶ 26 Under the Act, a defendant has the right to proceed *pro se* even if he originally elected to have postconviction counsel appointed for him. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 22. However, the right is not absolute and requires that the defendant knowingly and intelligently relinquish his statutory right to counsel and that the relinquishment be "clear and unequivocal, not ambiguous." *Gray*, 2013 IL App (1st) 101064, ¶ 23. An unequivocal relinquishment is necessary to prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel and to prevent an abuse or manipulation of the judicial system by vacillating between requesting counsel and requesting to proceed *pro se*. *Gray*, 2013 IL App (1st) 101064, ¶ 23. The court must indulge every reasonable presumption against a waiver of the right to counsel. *Gray*, 2013 IL App (1st) 101064, ¶ 23.

¶ 27 In *Gray*, the defendant's appointed postconviction counsel did not amend or supplement the defendant's *pro se* postconviction petition. The defendant filed *pro se* amendments to his original petition and requested that the circuit court consider his *pro se* amendments or permit

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him to proceed *pro se*. The circuit court rejected postconviction counsel's suggestion that it consider the defendant's *pro se* amendments on the grounds that the defendant had counsel and the case had been pending for nine years. The court granted the State's motion to dismiss the petition. *Gray*, 2013 IL App (1st) 101064, ¶¶ 18-19.

¶ 28 On appeal, this court held that the circuit court's failure to properly consider the defendant's request for self-representation was an abuse of discretion. We found that the defendant's request to proceed *pro se* was unambiguous. There was no evidence that the defendant's request was a delaying tactic, and it would not have disrupted the orderly scheduling of proceedings. *Gray*, 2013 IL App (1st) 101064, ¶¶ 24, 26. We remanded the case for the court to determine if the defendant "has knowingly and intelligently relinquished his statutory right to counsel." *Gray*, 2013 IL App (1st) 101064, ¶ 27.

¶ 29 The State points out that the defendant's *pro se* reply to its motion to dismiss was marked "received" by the clerk's office but was not marked "filed." In *People v. Zirko*, 2012 IL App (1st) 092158, following his murder conviction, the defendant sent a *pro se* motion to the trial court seeking a new trial based on ineffective assistance of trial counsel. The *pro se* motion was stamped " 'Received' " by the clerk of the court, but the motion was not file stamped and was never ruled on by the trial judge. Trial counsel's motion for a new trial was denied, and the defendant appealed. *Zirko*, 2012 IL App (1st) 092158, ¶ 30. On appeal, this court affirmed. In order to trigger the court's duty to hold a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the defendant must bring his claim of ineffective assistance of counsel to the trial judge's attention. Since the defendant had appeared before the trial judge during the sentencing hearing

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but never brought his *pro se* motion to the attention of the judge, the defendant forfeited his ineffective assistance claim. *Zirko*, 2012 IL App (1st) 092158, ¶¶ 70, 72; see *People v. Allen*, 409 Ill. App. 3d 1058 (2011) (where the defendant raised his claim of ineffective assistance of counsel in a letter to the trial judge but failed to bring his claim to the attention of the judge during his posttrial appearances, the defendant forfeited his claims of ineffective assistance of counsel).

¶ 30 In both *Zirko* and *Allen*, the defendants were present in court and had the opportunity to present their claims in person. Their failure to do so resulted in forfeiture of their claims. In the present case, the defendant was an inmate at the Menard correctional facility during these proceedings, and he was not present at the hearing on the State's motion to dismiss.

¶ 31 Moreover, the record on appeal reveals an inconsistency with regard to the receipt and filing of the defendant's *pro se* pleadings. The record contains the defendant's *pro se* supplement to his *pro se* postconviction petition and his *pro se* reply to the State's motion to dismiss, which contained his request to represent himself. Both notices of filing and proof of service were directed to the circuit court clerk's office and the Cook County State's Attorney. While it listed an address for the clerk, the notice did not list an address for the State's Attorney. Neither APD Landrum nor the public defender's office was listed in the notice of filing. Both notices of filing and proof of service requested the clerk to return a file stamped copy of the document to the defendant. The defendant's *pro se* supplement to his *pro se* petition was marked "filed." His *pro se* reply was marked "received" on August 16, 2013 by the clerk, but neither the notice of filing nor the reply was filed stamped.

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¶ 32 The State argues that the notice was directed to the clerk but was improperly addressed to the State's Attorney and was not directed to the public defender's office or APD Landrum. That argument does not explain why the defendant's *pro se* reply was not marked "filed" as his *pro se* supplement to his petition was. We acknowledge there is no evidence that the circuit court, the assistant State's Attorney or APD Landrum were aware of the defendant's *pro se* filings.

Nonetheless, under the circumstances, which included the defendant's belief that APD Landrum would no longer advocate for him, we believe that the defendant asserted his right to represent himself in these proceedings as best he could.

¶ 33 The State maintains that the defendant's request to represent himself was equivocal and ambiguous unlike the request in *Gray*. In *Gray*, this court found that the defendant's request was unambiguous even though he requested it in the alternative to his request that the trial court consider his *pro se* amendments while allowing him to retain his counsel. Since the trial court refused to accept the amendments while he was still represented, the defendant's request to proceed *pro se* was the only way his claims would be raised before the court. *Gray*, 2013 IL App (1st) 101064, ¶ 24.

¶ 34 In his *pro se* reply, the defendant asserted that because APD Landrum was refusing to advocate for him, he was requesting the appointment of outside counsel, or "[n]ow at the very least Mr. Scott request the chance to advocate for himself Pro se in this stage two hearing and hopefully in a stage evidentiary hearing also." The defendant's frustration which is reflected in his correspondence with APD Landrum and his *pro se* filings is understandable in light of the differing views of his case by the various APDs who represented him in these proceedings. In

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remanding this case for second-stage proceedings, we expressed our belief that the defendant would have the benefit of counsel in responding to the State's dismissal arguments. Our belief is not borne out by the record of the proceedings below. Much like the defendant in *Gray*, the defendant determined that the only way his claims would be heard by the circuit court was by presenting them himself.

¶ 35 The State's reliance on *People v. Rosho*, 398 Ill. App. 3d 1035 (2010) is misplaced. In that case, the reviewing court held that the defendant's request to proceed *pro se* was not unequivocal. The defendant had made previous requests for new counsel and his final request for a continuance had been denied. Moreover, the request was made on the day of trial leading to the conclusion that it was merely an attempt to delay the trial. *Rosho*, 398 Ill. App. 3d at 1042. In the present case, the defendant's request for self-representation was motivated by his desire to argue his claims to the circuit court which his appointed counsel refused to do, and there is no evidence that by requesting to represent himself, the defendant was attempting to delay the proceedings.

¶ 36 We conclude that the defendant's request to proceed *pro se* at the second stage of postconviction proceedings was unequivocal, timely and should have been considered and ruled on by the circuit court. For that reason, we vacate the second-stage dismissal of the defendant's *pro se* postconviction petition and remand this case to the circuit court for the limited purpose of ruling on the defendant's request to proceed *pro se*. On remand, the court shall hold a hearing and determine whether the defendant has made a knowing and intelligent relinquishment of his statutory right to counsel. See *Gray*, 2013 IL App (1st) 101064, ¶ 27. In the event, the court

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determines that the defendant has made a knowing and intelligent relinquishment of his statutory right to counsel, the defendant shall be permitted to file his *pro se* supplement to his *pro se* petition and his *pro se* reply to the State's motion to dismiss. The court shall then hold a new hearing on the State's motion to dismiss where the defendant shall represent himself. In the event the court finds that the defendant has not made a knowing and intelligent relinquishment of his statutory right to counsel, the court shall reinstate the dismissal order pending our further review.

¶ 37 We retain jurisdiction over this case to decide the other issues, if necessitated by the outcome of the hearing.

¶ 38 The judgment of the circuit court is vacated; cause remanded with instructions.

¶ 39 Vacated and remanded.