

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).

2016 IL App (4th) 140248-U

NO. 4-14-0248

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 30, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Calhoun County
RANDELL L. OWENS,)	No. 13CF17
Defendant-Appellant.)	
)	Honorable
)	Richard D. Greenlief,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in allowing defendant to proceed *pro se* after finding defendant's waiver of counsel was knowingly and intelligently made.

(2) The appellate court declined to reach the merits of defendant's claim of ineffective assistance of counsel, finding the claim better pursued in a postconviction proceeding, where a complete record explaining counsel's conduct can be made.

¶ 2 Defendant, Randell L. Owens, appeals from the judgment of the circuit court of Calhoun County entered upon resentencing after the court found him in violation of his probation. Defendant had pleaded guilty to the unlawful failure to register as a sexual predator and was sentenced to probation. After a few months, the State filed a petition to revoke defendant's probation, alleging he failed to maintain accurate registration records and failed to report to court services. Defendant waived his right to counsel and proceeded *pro se* until

resentencing. He appeals, claiming (1) the trial court abused its discretion in allowing him to proceed without counsel, and (2) his appointed counsel rendered ineffective assistance when he failed to amend defendant's posttrial motion to include what defendant considered to be a valid claim. We affirm.

¶ 3

I. BACKGROUND

¶ 4

In April 2013, defendant was charged with unlawful failure to register as a sexual predator, a Class 3 felony (730 ILCS 150/3, 10 (West 2012)). Initially, the trial court appointed counsel to represent defendant. However, within a few months, defendant advised he wished to proceed *pro se*. At a hearing, appointed counsel informed the trial court of defendant's desire to proceed without counsel, stating: "I've talked to [defendant] and he's quite knowledgeable, if not probably the most knowledgeable layperson I have ever talked to in regard to criminal law and procedure." Nevertheless, the court denied defendant's request to proceed *pro se*.

¶ 5

With the assistance of counsel, defendant pleaded guilty as part of a fully negotiated plea agreement. In exchange for his guilty plea, defendant was sentenced to 18 months' probation. His probation supervision was transferred to Sangamon County as his reported place of residence. After admonishing defendant, the trial court asked him if he was satisfied with counsel's representation. Defendant said: "Yes, I'm satisfied." The court accepted defendant's guilty plea and sentenced him accordingly.

¶ 6

In October 2013, the State filed a petition to revoke defendant's probation, alleging he failed to report to his Sangamon County probation officer and failed to maintain accurate registration records. On November 5, 2013, the trial court conducted a hearing, advising defendant of the claims alleged in the pending petition and admonishing him of his rights. As the hearing progressed, defendant posed questions to the court regarding his confusion

about the petition to revoke as it related to the underlying offense. Defendant questioned whether he would be able to withdraw his guilty plea in light of the allegations of the probation violation. The court explained defendant's rights related to the State's petition to revoke, including his right to counsel, his right to confront witnesses, the State's burden to prove the allegations by a preponderance of the evidence, and his right to a hearing, as opposed to his right to a jury trial. Defendant indicated he understood his rights, the allegations stated in the petition, and the possible penalties. The court asked defendant if he would like to have an attorney appointed to represent him. Defendant said he "would like to represent [himself]."

¶ 7 The trial court stated it was prepared to reappoint the public defender, but defendant refused. Defendant requested a recognizance bond, to which the State objected. During defendant's argument in support of his request, he alleged his public defender had advised him he was not required to report to a probation officer in Sangamon County. Defendant explained he was willing to report and would "do it tomorrow" if he was released from jail. The court advised defendant that anything he said in court could be used against him. The court denied defendant's request for a recognizance bond. Defendant also claimed he had filed "a civil rights lawsuit against" his public defender. That being said, the court told defendant he could appoint a different public defender to represent him. Defendant declined.

¶ 8 On November 12, 2013, defendant appeared *pro se* at the hearing on the State's petition to revoke his probation. He informed the trial court he was not ready to proceed because he had no access to the law library to prepare. He said: "I'm not quite sure I understand everything in regards to this, and I haven't received any kind of discovery in regard." The court agreed to grant defendant a continuance if he chose one of two options: (1) have counsel appointed to represent him, or (2) have the court appoint standby counsel to assist with research.

Otherwise, the court indicated, it would proceed with the hearing. Defendant expressed his concern about proceeding on the petition to revoke without access to the law library to conduct research. Defendant said: "I just figure that if I allowed this petition to revoke probation to proceed today that I'm not going to be fully aware of what the consequences of allowing this petition for him to be able to argue this before the court, based on the preponderance of the evidence, and I have not—." The court renewed the offer to appoint either counsel or standby counsel. Defendant was adamant about proceeding *pro se* because he wanted the court to hear his motion to vacate custody the same day. Defendant said: "Let's proceed today." He said he was certain of his decision "[i]f it's not going to put [him] in prison."

¶ 9 The trial court proceeded on the State's petition to revoke probation. Deborah Tepen, the Calhoun County chief probation officer, testified defendant reported an address in Springfield, Sangamon County, on his intake questionnaire. Tepen said she met with defendant on July 2, 2013, and explained the conditions of his probation, including the requirement that he report to the Sangamon County probation office. On July 31, 2013, she mailed a letter to defendant, at the address he had given her in Springfield, requesting he report to the Sangamon County probation office on a particular date. The letter was returned as undeliverable on August 5, 2013. Tepen testified the Illinois sex offender information website showed defendant noncompliant as of August 9, 2013. The State rested.

¶ 10 Defendant testified on his own behalf. He said his attorney told him he was not required to report to the Sangamon County probation office. On cross-examination, defendant said he completed a sexual-offender-information form with the Springfield police department in February 2013, indicating his address was 1124 South 11th Street in Springfield. He did not

remember whether he completed another form after he moved, in July 2013, into a different residence, located at 3028 South 11th Street, Unit 2, in Springfield.

¶ 11 After considering the evidence and arguments, the trial court found the State had proved by a preponderance of the evidence that defendant failed to register his address with the Springfield police department by July 6, 2013, and failed to report to the Calhoun County probation office when he was not contacted by the Sangamon County probation office. The court scheduled the matter for resentencing.

¶ 12 Next, the trial court considered defendant's "motion to vacate custody," alleging his right to represent himself was unconstitutionally hindered by being in custody. After considering arguments, the court denied defendant's motion and remanded him into the custody of the sheriff.

¶ 13 On November 21, 2013, defendant filed a motion for substitution of judge, alleging the Honorable Richard D. Greenlief was prejudiced against him because defendant had named Judge Greenlief as a defendant in a civil lawsuit. The trial court, the Honorable J. Frank McCartney presiding, conducted a hearing on defendant's motion, finding no evidence of prejudice toward defendant. The court denied defendant's motion.

¶ 14 On January 10, 2014, the trial court conducted a resentencing hearing. Defendant requested counsel, so the court continued the hearing until January 24, 2014. At that time, defendant appeared with counsel. After considering the evidence and arguments of counsel, the court sentenced defendant to four years in prison.

¶ 15 Defendant's counsel filed a motion to reconsider his sentence and a motion to withdraw his guilty plea. After a hearing, the trial court denied both motions.

¶ 16 This appeal followed.

¶ 17

II. ANALYSIS

¶ 18

A. Waiver of Counsel

¶ 19

Defendant first contends the trial court erred in accepting his waiver of counsel after he had expressed confusion over the nature of the proceedings. He argues the court's decision to allow him to proceed *pro se* constituted plain error when he was without the benefit of counsel during a critical stage in the proceedings.

¶ 20

Because defendant has not raised the issue before raising it in this appeal, he has forfeited review of the claim. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). However, "a defendant may bypass such forfeiture when plain error occurs." *People v. Bowens*, 407 Ill. App. 3d 1094, 1108 (2011).

"Plain error occurs when the error is 'clear and obvious' and

(1) 'the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,' or (2) 'that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' [Citation.] Under the first prong, a defendant must prove that the unpreserved error was prejudicial. [Citation.] Under the second prong, the burden of proof is again on the defendant, but this time he must show that the error was serious—that is, it affected the fairness of the proceeding [citation] and 'challenged the integrity of the judicial process.' " *People v.*

Bowens, 407 Ill. App. 3d at 1108 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007)).

¶ 21 The first step in a plain-error analysis is to determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613. "As a matter of convention, [a reviewing] court typically undertakes plain-error analysis by first determining whether error occurred at all. If error is found, the court then proceeds to consider whether either of the two prongs of the plain-error doctrine have been satisfied. Under both prongs, the burden of persuasion rests with the defendant." *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 22 Accordingly, defendant must demonstrate he did not knowingly or intelligently relinquish his right to counsel. See *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 20. The standard by which the trial court should be guided when deciding whether to allow a defendant to proceed *pro se* is whether the defendant has "a full awareness of the nature and consequences of his decision to proceed without counsel." *Woodson*, 2011 IL App (4th) 100223, ¶ 23. The extent of the defendant's legal knowledge or his ability to represent himself is not the consideration. *Woodson*, 2011 IL App (4th) 100223, ¶ 23. That is, a defendant's competency to choose self-representation is not based on the level of the defendant's abilities as a lawyer. *People v. Simpson*, 172 Ill. 2d 117, 137-38 (1996). However, whether a defendant has made an intelligent waiver of the right to counsel depends upon the facts and circumstances of each case, including the background, experience, and conduct of the accused. *People v. Baez*, 241 Ill. 2d 44, 116 (2011).

¶ 23 A defendant's right to proceed *pro se* is as "basic and fundamental as his right to be represented by counsel." (Internal quotation marks omitted.) *People v. Silagy*, 101 Ill. 2d 147, 179 (1984). Our supreme court has stated: "Although a court may consider a defendant's

decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted." *Baez*, 241 Ill. 2d at 116. In other words, the trial court must determine whether a defendant has the requisite capacity to represent himself. See *People v. Ward*, 208 Ill. App. 3d 1073, 1082 (1991). In this context, "capacity" refers to defendant's mental capabilities, not to his knowledge and understanding of the rules of law and procedure. "Unless the defendant had a mental disability that incapacitated him from understanding the content of Rule 401(a) [(Illinois Supreme Court Rule 401(a) (eff. July 1, 1984))], the sixth amendment (U.S. Const., amend. VI) required the court to honor his choice to represent himself, even if the choice was in all likelihood a disastrous one for the defense." *People v. Fisher*, 407 Ill. App. 3d 585, 590 (2011). Indeed, this court has noted three possible grounds for denying a defendant's request to proceed without counsel: (1) the request comes too late in the proceedings, (2) the defendant has engaged in "serious and obstructionist misconduct," or (3) the defendant is unable to make a knowing and intelligent waiver of his right to counsel. *Ward*, 208 Ill. App. 3d at 1084.

¶ 24 A reviewing court will not reverse unless the trial court's determination of whether the defendant knowingly and intelligently waived his right to counsel constituted an abuse of discretion. *Woodson*, 2011 IL App (4th) 100223, ¶ 21. An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 25 In this case, the trial court did not abuse its discretion in granting defendant's request to proceed without counsel. Defendant made multiple unequivocal requests to proceed on his own after he was given repeated full admonitions and encouraged by the court to consider, at least, standby counsel. He insisted he understood each admonishment. Further, no evidence in the record suggests defendant suffered from any mental disability or a diminished mental

capacity which could render his waiver of counsel unknowingly or unintelligently made. Rather, defendant actively participated in each proceeding, making astute and cognizant arguments on his own behalf. His occasional confusion related to legal principles or procedural rules and was not a product of a lack of mental capacity to understand the waiver of his right to counsel. In fact, if defendant expressed even slight confusion over any principle, the court took time to thoroughly explain before proceeding. It is worth noting that defendant's initial appointed counsel referred to defendant as "probably the most knowledgeable layperson [he has] ever talked to in regard to criminal law and procedure." Based on this record, we conclude the court did not abuse its discretion in allowing defendant to proceed *pro se* after finding defendant's waiver of counsel was knowingly and intelligently made. Having found no error, we must honor defendant's procedural default.

¶ 26 B. Ineffective Assistance of Counsel

¶ 27 Defendant next contends his appointed counsel rendered ineffective assistance when he failed to file an amended posttrial motion to include a claim that defendant's guilty plea was coerced. Because we cannot discern from the record on appeal why counsel did not file an amendment to defendant's *pro se* motion, we decline to reach the merits of this issue.

¶ 28 At the January 10, 2014, hearing, which had been scheduled for defendant's resentencing, the trial court appointed Jeff McDonald as defendant's appointed counsel. The State brought to the court's attention that defendant had filed a *pro se* "motion to vacate conviction" that had not been ruled upon. Counsel asked the court for leave "to amend all of the *pro se* motions." The court allowed McDonald leave to file any amended pleading. However, he did not do so. Rather, McDonald filed only a motion to withdraw defendant's guilty plea, which was denied as untimely.

¶ 29 Ineffective assistance of counsel claims are judged under the now familiar standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a defendant must first demonstrate that his defense counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment." *Strickland*, 466 U.S. at 687. In so doing, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Strickland*, 466 U.S. at 689. Second, a defendant must demonstrate a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both prongs of the *Strickland* test must be satisfied before a defendant can prevail on a claim of ineffective assistance of counsel. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 30 In *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990), this court held adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made. In *Kunze*, the ineffective-assistance-of-counsel claim turned on whether the defendant would have testified had he known in advance that the State would use his prior convictions to impeach him. *Kunze*, 193 Ill. App. 3d at 725. The defendant claimed his counsel was ineffective for failing to investigate his prior criminal history and for consequently advising him to testify. *Kunze*, 193 Ill. App. 3d at 724. Because nothing in the record allowed for a determination as to why counsel advised the defendant to testify, this court declined to adjudicate the defendant's claim. *Kunze*, 193 Ill. App. 3d at 725-26.

¶ 31 As in *Kunze*, the record here contains nothing to review with respect to why counsel did not amend defendant's "motion to vacate conviction" or otherwise challenge defendant's guilty plea as being coerced. Because the answer to that question is currently *dehors* the record, we decline to consider it. See *People v. Calvert*, 326 Ill. App. 3d 414, 421 (2001). Rather, defendant's claim of ineffective assistance may be brought under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). See *People v. Holloman*, 304 Ill. App. 3d 177, 186 (1999) (citing *Kunze*, this court on direct appeal declined to address whether trial counsel's failure to make a motion to suppress evidence constituted ineffective assistance); *People v. Flores*, 231 Ill. App. 3d 813, 827-28 (1992) (this court could not determine whether trial counsel's conduct constituted incompetence or trial strategy and recommended the claim be brought in a postconviction petition); *In re Carmody*, 274 Ill. App. 3d 46, 56 (1995) (noting the record on direct appeal rarely contains sufficient information regarding counsel's tactics).

¶ 32 Accordingly, consistent with the line of authority beginning with *Kunze*, we likewise hold as follows: "Because the answers to the questions pertinent to defendant's claim are currently [*dehors*] the record, we decline to consider them. Instead, defendant may pursue his claim under the [Act] (725 ILCS 5/122-1 through 122-8 (West 2002))." *People v. Durgan*, 346 Ill. App. 3d 1121, 1143 (2004).

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.