2018 IL App (5th) 140538-U

NO. 5-14-0538

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 10-CF-425
	)	
ROBERT J. MONTIJO,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of the defendant's petition for postconviction relief is affirmed where he failed to set forth the gist of a constitutional claim that the court denied him the right to counsel of choice by denying his request for a continuance or that his counsel on direct appeal was ineffective for failing to challenge the court's dismissal of his *pro se* motion to reduce sentence.

¶ 2 The defendant, Robert J. Montijo, appeals from the trial court's summary dismissal of his *pro se* petition for postconviction relief. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In August 2010, the defendant was arrested on a charge of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)); the Jackson County public defender was appointed to represent him; and the State obtained an order requiring him to provide samples of his hair, blood, and saliva pursuant to Illinois Supreme Court Rule 413(a)(vii) (eff. July 1, 1982). In September 2010, after the defendant refused to provide the Carbondale Police Department with a buccal swab for DNA comparison purposes, the trial court found him in indirect civil contempt. See *People v. Henne*, 11 Ill. App. 3d 405, 406-07 (1973). The record indicates that appointed counsel was present when the defendant refused to provide the swab.

¶ 5 In October 2010, referencing the defendant's failure to cooperate with the Carbondale Police Department's efforts to obtain a buccal swab sample of his DNA, the State filed a petition requesting authorization for the department's use of reasonable force to obtain a sample. At a subsequent hearing on the petition, appointed counsel advised the court that the defendant believed that the Carbondale Police Department was biased against him and that "he would ask that the Illinois State Police be the ones to take the sample." Suggesting that the defendant was being unnecessarily difficult over a simple and routine procedure that merely required him to "open [his] mouth" so that a "cotton swab [could be] placed inside," the court ordered the defendant to provide the Carbondale Police Department with a buccal swab and authorized the department's use of reasonable force to obtain the same. The court further stated that it did not "want to hear any other complaints about this." Appointed counsel then stated, "[T]he defendant would like to

ask that this matter of the swab be continued until he can hire a private attorney that could be present at such time." Without elaboration or additional inquiry, the trial court denied the defendant's request. Thereafter, the defendant provided the Carbondale Police Department with a buccal swab, and no further mention of private counsel was ever made.

¶ 6 In January 2011, a Jackson County jury found the defendant guilty as charged. At trial, the State's evidence established that after the defendant and a cohort forced entry into a Carbondale apartment shortly before 6 a.m. on May 4, 2010, the defendant, whose face was concealed with a blue bandana, brandished an automatic pistol and demanded money from the apartment's two residents. The defendant then took between $200 and $300 that one of the residents had stored in a notebook. When subsequently fleeing the scene, the defendant dropped the bandana that he had been wearing on the sidewalk in front of the apartment building. The defendant's DNA was later found on the bandana, and a fingerprint matched to the defendant was found inside the victims' apartment. At trial, the defendant's girlfriend, Syrena Payne, provided him with an alibi, but the jury rejected her claim that he was at her house when the crime occurred. We note that the defendant was 28 years old at the time of the offense and that the cause proceeded to sentencing on April 14, 2011.

¶ 7 At the defendant's sentencing hearing, the State advised that while home invasion is generally a Class X felony with a sentencing range of 6 to 30 years, the fact that the defendant committed the offense while armed with a firearm mandated that 15 years be added to whatever sentence the trial court imposed. See 720 ILCS 5/12-11(a)(3), (c)

(West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Arguing, among other things, that the defendant had a significant criminal history, the State maintained that a sentence totaling 30 years would be appropriate under the circumstances. The State noted that despite his "relatively young" age, the defendant had already been to prison on three previous occasions and had been given multiple prior opportunities "to turn away from his criminal ways." We note that the defendant's presentence investigation report summarized his criminal history as follows:

> "[The defendant's] prior criminal history includes dispositions for the offenses of Aggravated Battery/Peace Officer, Theft, Traffic, Residential Burglary, Illegal Transportation of Alcohol - Driver, No Valid Driver's License, Possession of a Controlled Substance, Forge/Certificate, Possession of a Stolen Vehicle, Reckless Conduct, Attempt Burglary, Driving on Suspended License, and Operation of an Uninsured Motor Vehicle. In addition, charges of Driving Under the Influence of Alcohol, Operation of an Uninsured Motor Vehicle, Unlicensed, Improper Traffic Lane Usage, Domestic Battery, Interfering With the Reporting of Domestic Violence, and Battery, are pending in Lee County, Illinois."

¶ 8 In response, emphasizing that neither of the victims had been physically harmed by the defendant's conduct in the present case, defense counsel asked the court to impose the minimum sentence of 21 years. Describing the home invasion as "a planned attack," the court ultimately sentenced the defendant to 25. The court found that the defendant's conduct had threatened serious harm, that he had a history of prior criminal activity, and that there was "a necessity for deterrence." See 730 ILCS 5/5-5-3.2(a)(1), (3), (7) (West

2010). Referencing the defendant's presentence investigation report, the court characterized the defendant's prior criminal history as "self-explanatory."

¶ 9 On May 5, 2011, defense counsel filed a timely notice of appeal pursuant to Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). On May 9, 2011, while incarcerated at the Western Illinois Correctional Center in Mt. Sterling, the defendant mailed the trial court a *pro se* motion to reduce sentence, which the court did not receive as filed until May 24. The defendant's *pro se* motion alleged that the 25-year sentence that he received was excessive given that he did not have "an extensive criminal history," that he had "no violence in [his] background," and that he was "innocent." The trial court subsequently denied the motion as untimely, finding that it had not been filed within 30 days following the imposition of the defendant's sentence. See 730 ILCS 5/5-4.5-50(d) (West 2010).

¶ 10 On May 11, 2011, the trial court entered an order appointing the Office of the State Appellate Defender to represent the defendant on direct appeal. In January 2014, the defendant's conviction was affirmed on direct appeal. See *People v. Montijo*, 2014 IL App (5th) 110212-U.

¶ 11 In September 2014, the defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). The defendant's petition set forth numerous allegations of error, including a claim that the trial court had arbitrarily denied his pretrial request for a continuance so that he could hire a private attorney without first inquiring into his reasons for making the request. The defendant maintained that the trial court had thereby denied him his right to

counsel of choice. Attached as an exhibit to the petition was an affidavit from Maria Hart, who claimed that she was the defendant's girlfriend and had been in "almost daily contact" with him prior to his trial. She further claimed that the defendant and his appointed attorney had been experiencing serious problems when the defendant had requested the opportunity to obtain private counsel and that she had been "trying to get loans of money to hire a private attorney."

¶ 12 Referencing the "mailbox rule" (*People v. Maiden*, 2013 IL App (2d) 120016, ¶ 13), the defendant's petition also alleged that appointed counsel on direct appeal had been ineffective for failing to argue that the trial court should not have dismissed his *pro se* motion to reduce sentence as untimely, despite assuring him that the issue would be raised. Attached as an exhibit to the petition was a copy of an April 6, 2012, letter from the defendant's direct appeal counsel indicating that she would raise the dismissal issue in a motion for summary relief asking that the cause be remanded so that the trial court could consider the *pro se* motion.

¶ 13 The trial court subsequently entered an order summarily dismissing the defendant's postconviction petition as frivolous and patently without merit. In October 2014, the defendant filed a timely notice of appeal.

¶ 14 DISCUSSION

¶ 15 The defendant contends that the trial court erred in summarily dismissing his petition for postconviction relief because it set forth two meritorious claims, *i.e.*, that the trial court improperly denied his request for a continuance to retain substitute counsel without conducting any inquiry into his reasons for making the request and that he was

denied the effective assistance of appellate counsel where appellate counsel failed to challenge the trial court's dismissal of his *pro se* motion to reduce sentence. We disagree and conclude that summary dismissal was appropriate in the present case. See *People v. Johnson*, 312 Ill. App. 3d 532, 534 (2000) ("Summary dismissal is a process that exists to cull petitions that are frivolous in nature or patently without merit.").

¶ 16 The Post-Conviction Hearing Act

¶ 17 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 18 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable

basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 19 If a petition is not summarily dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss it. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2014). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245. "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 20 Failure to Challenge

¶ 21 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "The *Strickland* standard applies equally to claims of ineffective appellate counsel, and a defendant raising such a claim

must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 22 The defendant claims that counsel on direct appeal was ineffective for failing to challenge the trial court's determination that his *pro se* motion to reduce sentence was untimely filed. This claim is indisputably meritless, however, because appellate counsel argued the issue in a motion for summary relief, just as she stated she would in her April 6, 2012, letter to the defendant.

¶ 23 "[A] court will take judicial notice of its own records." *People v. Jackson*, 182 Ill. 2d 30, 66 (1998). Here, on April 18, 2012, appellate counsel filed a motion for summary relief arguing that because the defendant's *pro se* motion to reduce sentence was postmarked May 9, 2011, it was timely filed under the mailbox rule. See *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 14; *People v. Simmons*, 164 Ill. App. 3d 205, 206 (1987). The motion further argued that the timely-filed motion had effectively dismissed the notice of appeal that trial counsel filed on May 5, 2011. See *People v. Richmond*, 278 Ill. App. 3d 1042, 1046 (1996).

¶ 24 On April 26, 2012, the State filed an answer to the defendant's motion for summary relief. In its answer, the State did not contest that the defendant's *pro se* motion

to reduce sentence was timely filed under the mailbox rule. Noting that the motion had been filed while the defendant was still represented by trial counsel, the State rather maintained that because the defendant's motion did not allege ineffective assistance of counsel, he could not properly proceed *pro se* and through counsel at the same time. See *People v. Rucker*, 346 Ill. App. 3d 873, 882-83 (2003), *abrogated on other grounds by People v. Ayres*, 2017 IL 120071. The State thus contended that the trial court was not required to consider the defendant's *pro se* motion and that the motion had not invalidated the defendant's previously filed notice of appeal. See *id.* at 883-84.

¶ 25 On April 15, 2013, without elaboration, this court entered an order denying the defendant's motion for summary relief. We thus implicitly agreed with the State's contention that even though the defendant's *pro se* motion to reduce sentence was timely filed, it was nevertheless properly dismissed. See *People v. Smith*, 406 Ill. App. 3d 747, 752 (2010) (noting that a reviewing court can sustain the judgment of a lower court on any appropriate basis, regardless of whether the reasoning employed by the lower court was correct). Our ruling on the issue therefore became the law of the case, and any attempt to further advance the defendant's underlying argument would have been futile. See *People v. Klepper*, 234 Ill. 2d 337, 346 (2009); *People v. Fields*, 2011 IL App (1st) 100169, ¶ 17. In any event, the defendant's claim that appellate counsel failed to challenge the trial court's determination that his *pro se* motion to reduce sentence was untimely filed is indisputably meritless, as appellate counsel argued the issue in a motion for summary relief. Accordingly, the trial court properly rejected this claim as frivolous and patently without merit. Moreover, even assuming that appellate counsel had not

challenged the trial court's determination that the defendant's *pro se* motion to reduce sentence was untimely, we agree with the State's intimation that the defendant would have ultimately been unable to establish either prong of *Strickland*, given that the motion's factual assertions are belied by the record.

¶ 26 Failure to Inquire

¶ 27 A defendant's right to counsel includes the right to be represented by his or her counsel of choice. *People v. Baez*, 241 Ill. 2d 44, 104-05 (2011). "Violations of the right to counsel of choice are structural errors not subject to harmless-error review, and they therefore do not depend on a demonstration of prejudice by defendant." *Id*. at 105. Nevertheless, a defendant's right to counsel of choice is not unlimited. See *Wheat v. United States*, 486 U.S. 153, 159 (1988). The right "does not extend to defendants who require counsel to be appointed for them," for instance. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); see also *People v. Howard*, 376 Ill. App. 3d 322, 335 (2007) (noting that a defendant has no right to an attorney he cannot afford). Moreover, the right to counsel of choice cannot be employed as a means to "thwart the administration of justice or to otherwise embarrass the effective prosecution of crime." *People v. Myles*, 86 Ill. 2d 260, 268 (1981).

¶ 28 The decision to grant or deny a defendant's request for a continuance to obtain private counsel lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Jackson*, 216 Ill. App. 3d 1, 7 (1991). An unreasonable or arbitrary denial of a request for a continuance to obtain private counsel can violate a defendant's right to counsel if the ultimate effect is to deny the defendant

the right to counsel of choice. See *United States v. Sinclair*, 770 F.3d 1148, 1154 (7th Cir. 2014); *United States v. Santos*, 201 F.3d 953, 958 (7th Cir. 2000). As a result, a thorough inquiry into a defendant's reasons for making such a request is sometimes necessary. See *People v. Montgomery*, 373 Ill. App. 3d 1104, 1112 (2007), *abrogated on other grounds by People v. Ayres*, 2017 IL 120071. It is well settled, however, that the denial of a request for a continuance to obtain private counsel is not an abuse of discretion if private counsel is not identified or does not stand ready, willing, and able to make an unconditional entry of appearance. See, *e.g.*, *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000); *People v. Childress*, 276 Ill. App. 3d 402, 411 (1995); *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1992); *Jackson*, 216 Ill. App. 3d at 7; *People v. Free*, 112 Ill. App. 3d 449, 454 (1983). We note that in *Segoviano*, our supreme court made clear that it is not an abuse of discretion to deny a request for a continuance to obtain private counsel "in the absence of ready and willing substitute counsel." *Segoviano*, 189 Ill. 2d at 245; see also *Montgomery*, 373 Ill. App. 3d at 1111.

¶ 29 Here, the defendant argues that the trial court denied him his right to counsel of choice by denying his request for a continuance to retain private counsel. Citing *People v. Green*, 42 Ill. 2d 555 (1969), *People v. Tucker*, 382 Ill. App. 3d 916 (2008), *People v. Bingham*, 364 Ill. App. 3d 642 (2006), and *People v. Basler*, 304 Ill. App. 3d 230 (1999), the defendant maintains that the court had a duty to inquire into his reasons for making the request before denying it.

¶ 30 At the outset, we find that the defendant has waived consideration of this claim by failing to raise it on direct appeal. See *People v. Allen*, 2015 IL 113135, ¶ 20; *People v.*

Sanders, 238 Ill. 2d 391, 398 (2010); *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). "Postconviction claims are limited to those claims that were not and could not have been previously adjudicated on direct appeal," and issues that could have been raised on direct appeal, but were not, are considered waived. *Sanders*, 238 Ill. 2d at 398. We further find that waiver aside, the defendant's contention that the trial court denied him the right to counsel of choice is patently without merit.

¶ 31 As previously noted, the record indicates that appointed counsel was present when the defendant refused to provide the Carbondale Police Department with a buccal swab sample of his DNA. At the hearing on the State's petition to authorize the department's use of reasonable force to obtain the sample, the defendant indicated that he did not want the Carbondale Police Department to collect the sample because he felt that the department was biased against him. At the same time, however, he indicated that he would allow the Illinois State Police to collect it. After the court ordered the defendant to provide the Carbondale Police Department with a buccal swab without further complaints, the defendant requested that the "matter of the swab be continued until he [could] hire a private attorney that could be present at such time." After the defendant's request was denied, he provided the Carbondale Police Department with a buccal swab, and no further mention of private counsel was ever made. We note that at no point during the proceedings below did the defendant ever express dissatisfaction with appointed counsel's representation.

¶ 32 Under the circumstances, the defendant's request for a continuance cannot reasonably be construed as a request for a continuance to obtain "substitute" counsel that

required further inquiry, as the defendant suggests on appeal. In context, the request was for a continuance to retain additional counsel for the limited and specific purpose of having a private attorney present when his DNA sample was taken by the Carbondale Police Department. The defendant had no right to have counsel present when his DNA sample was taken, however (see *United States v. Wade*, 388 U.S. 218, 227-28 (1967); *United States v. Lewis*, 483 F.3d 871, 873-74 (8th Cir. 2007); *People v. Pugh*, 49 Ill. App. 3d 174, 182 (1977)), so his right to counsel of choice was neither implicated nor violated by the trial court's ruling on the matter (see *Lewis*, 483 F.3d at 874). Moreover, even assuming *arguendo* that the defendant's request for a continuance had been made for the purpose of obtaining substitute counsel, the defendant would still be unable to establish that the trial court abused its discretion in denying it. Given that the defendant was indigent, had never voiced any complaints about appointed counsel's representation, had previously refused to cooperate with the State's efforts to obtain a buccal swab, and had failed to identify a private attorney who was ready and willing to enter an appearance in the case, we ultimately agree with the State's suggestion that the trial court could have readily concluded, without further inquiry, that the defendant's request for a continuance was a tactic aimed at further delaying the State's collection of his DNA. See *People v. Terry*, 177 Ill. App. 3d 185, 190-91 (1988).

¶ 33 We lastly note that none of the cases that the defendant cites in support of his argument on appeal involved a defendant's request for a continuance to obtain private counsel who could be present when his DNA was collected and that the cases are otherwise distinguishable. In *Green*, *Tucker*, and *Bingham*, the defendants represented

that they had either retained private counsel or were in the process of doing so, and nothing suggested that the requested continuances were dilatory. See *Green*, 42 Ill. 2d at 556-57; *Tucker*, 382 Ill. App. 3d at 921-24; *Bingham*, 364 Ill. App. 3d at 644-45. In *Basler*, the defendant had apparently not made efforts to retain private counsel, but *Basler* was decided prior to our supreme court's decision in *Segoviano*, and again, there was no "suggestion that the continuance was being sought to delay the defendant's case." *Basler*, 304 Ill. App. 3d at 233. In any event, we conclude that the trial court rightly rejected the defendant's postconviction contention that there was a duty to further inquire under the circumstances.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we hereby affirm the trial court's judgment summarily dismissing the defendant's petition for postconviction relief as frivolous and patently without merit.

¶ 36 Affirmed.