2019 IL App (2d) 150889-U
No. 2-15-0889
Order filed June 20, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GREGORY C. HERNANDEZ,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 98-CF-2637<br><br>Honorable Daniel G. Guerin, Judge, Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justice Jorgensen concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

**ORDER**

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's motion to proceed *pro se*, as he had vacillated on the question throughout the proceedings, which were nearly at an end.

¶ 2 Following a bench trial, defendant, Gregory C. Hernandez, was convicted of two counts of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 1998)), two counts of armed robbery (*id.* § 18-2(a)), two counts of aggravated battery of a senior citizen (*id.*§ 12-4.6(a)), and four counts of home invasion (*id.* § 12-11(a)). The court merged the aggravated-battery counts and two of the home-invasion counts into the other convictions and sentenced defendant to an

aggregate term of 90 years' imprisonment. He appealed, and this court reversed the attempted first-degree murder convictions; vacated one of the home-invasion convictions and one of the armed-robbery convictions; reinstated the convictions of aggravated battery; and remanded the cause for a new sentencing hearing. See *People v. Hernandez*, No. 2-02-0717 (2004) (unpublished order under Illinois Supreme Court Rule 23). Following that hearing, the court imposed an aggregate sentence of 80 years' imprisonment. Defendant again appealed, and this court affirmed. See *People v. Hernandez*, No. 2-08-0612 (2010) (unpublished order under Illinois Supreme Court Rule 23). Thereafter, defendant petitioned *pro se* for postconviction relief. Counsel was appointed to represent defendant, counsel filed an amended petition, defendant moved to represent himself, and defendant eventually withdrew that motion. Counsel filed a second amended postconviction petition, defendant again wished to proceed *pro se*, and the court granted that motion. Defendant filed a new *pro se* petition and asked that counsel be appointed to represent him. New counsel was appointed, an amended petition was filed, and defendant again moved to represent himself. The court denied that motion, and defendant moved the court to reconsider, asking the court to either let him proceed *pro se* or appoint a new attorney to represent him. The court denied the motion and eventually granted defendant's petition in part and denied it in part. The State appealed the partial grant to our supreme court, which reversed the trial court (see *People v. Hernandez*, 2016 IL 118672), and defendant appealed the partial denial to this court.[1] On appeal, defendant argues that the trial court erred when it denied his request to proceed *pro se*. We disagree. Because we do, we also address

[1] Even though defendant filed a notice of appeal that was insufficient to vest this court with jurisdiction, our supreme court directed us to consider the appeal on the merits. See *People v. Hernandez*, No. 123358 (Ill. Mar. 15, 2018) (supervisory order).

whether the State is entitled to a $50 fee pursuant to section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)). We determine that it is. Accordingly, we affirm the court's order denying defendant's motion to proceed *pro se*, and we grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 3 I. BACKGROUND

¶ 4 As intimated above, this case has a long history. We recite here only the facts necessary for a sufficient understanding of the issues raised.

¶ 5 Defendant filed a *pro se* postconviction petition in April 2005 while his second appeal was pending in this court. Because the trial court determined that his postconviction claims had arguable merit, counsel was appointed, and that attorney moved to stay proceedings on the petition until the appeal was resolved. This court resolved that appeal in August 2010, and counsel filed a first amended petition in February 2012.

¶ 6 The State moved to dismiss the petition in April 2012, and in September 2012 defense counsel advised the court that defendant did not want counsel to represent him. In October 2012, defendant filed a *pro se* motion to voluntarily withdraw the petition that counsel had filed. Defendant claimed in his motion that counsel's representation was substandard.

¶ 7 At a hearing held on that motion, the court asked defendant if he wished to withdraw the petition and start all over again. At first, defendant informed the court that he really did not want to do that. Defendant said that he wanted only "stylistic" changes made to the petition, and he thought that counsel could accomplish that by filing an amended petition. However, later during those same proceedings, defendant told the court that he wanted to proceed *pro se*. The court informed defendant about the difficulties it perceived if defendant represented himself, and it admonished defendant that, if he decided to proceed *pro se*, he could not change his mind at a

later date and ask the court to appoint counsel. Defendant said that he understood. After the court expressed its frustration with the fact that proceedings on this case had dragged on, defendant, who was concerned about being able to present his arguments, advised the court that he would be willing to have the court grant a continuance so that counsel could amend the petition. Thus, defendant withdrew his motion to voluntarily withdraw the petition, and the case was continued several times so that counsel could file an amended petition.

¶ 8 In March 2013, counsel filed a second amended petition. The State filed a motion to dismiss the next month, and arguments were heard in June 2013. The court continued the case until July 18, 2013, for a ruling on the State's motion to dismiss.

¶ 9 On July 9, 2013, before the court ruled on the State's motion to dismiss, defendant filed an emergency motion to voluntarily withdraw the petition.[2] The court granted the motion and noted that defendant had one year to file a new postconviction petition.

¶ 10 Two months later, defendant filed a new *pro se* postconviction petition and asked the court to appoint counsel to represent him. On December 4, 2013, the court found that defendant's petition had arguable merit and appointed a new attorney to represent defendant. The case was then continued several times for counsel to file an amended petition. Counsel filed a lengthy amended petition on June 18, 2014, incorporating all of defendant's claims and attaching several documents to support them. The court gave the State until July 23, 2014, to file a motion to dismiss. Six days before the State was scheduled to file its motion, defendant filed a

[2] In the motion, defendant claimed that he mailed it on June 30, 2013. The motion was file-stamped July 9, 2013.

*pro se* motion to represent himself.[3] In this motion, defendant claimed that counsel had failed to raise issues he had raised in his *pro se* petition.

¶ 11 The State filed its motion to dismiss on July 23, 2014, and the court, after expressing concern about ruling on defendant's motion without defendant being present, denied defendant's motion that same day. In doing so, the court found that defendant did not have a constitutional right to counsel in postconviction proceedings, and because the motion came so late, granting it would be disruptive to the orderly resolution of the proceedings. Defendant filed a motion to reconsider, asking the court to either allow him to proceed *pro se* or appoint another attorney to represent him. In this motion to reconsider, defendant argued, among other things, that counsel failed to attach evidence to support his claims. Specifically, he believed that counsel should have obtained an expert who could undermine fingerprint and DNA evidence presented at trial. The court denied the motion, finding that defendant had not made an unequivocal request to proceed *pro se*. The court indicated, however, that in ruling on the petition it considered what defendant filed *pro se*.

¶ 12 II. ANALYSIS

¶ 13 At issue in this appeal is whether the trial court erred when it denied defendant's request to proceed *pro se* on his postconviction petition. We review the trial court's determination on such matters for an abuse of discretion. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 23. A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would adopt the court's view. *People v. Clark*, 2018 IL App (2d) 150608, ¶ 26.

[3] The unnotarized proof of service attached to defendant's motion indicated that the motion was put in the mail on June 26, 2014. The motion was file-stamped July 17, 2014.

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides that a defendant has the right to represent himself in postconviction proceedings. *Gray*, 2013 IL App (1st) 101064, ¶ 21. That right, however, is not absolute. *Id.* ¶ 23. Rather, in order to invoke the right to proceed *pro se*, a defendant must articulately and unmistakably demand to represent himself. *Id.* Such a demand is required in order to prevent the defendant from (1) appealing the denial of his right to represent himself or the right to counsel and (2) manipulating or abusing the criminal justice system by vacillating between wanting counsel and wishing to proceed *pro se*. *Id.* Although courts must indulge in every reasonable presumption against waiver of the right to counsel (*id.*), a defendant who repeatedly changes his mind about proceeding *pro se* cannot be found to have sufficiently waived that right (*People v. Mayo*, 198 Ill. 2d 530, 538-39 (2002)).

¶ 15 In determining whether a defendant has undeniably made a demand to proceed *pro se*, courts must consider the context of the entire proceedings. *Id.* at 538. The timing of the defendant's request is significant. *People v. Burton*, 184 Ill. 2d 1, 24 (1998). Courts have held that a request to proceed *pro se* after meaningful proceedings have begun is too late and may be denied. See *id.* That is, if counsel has been intimately involved in lengthy proceedings, the court will not abuse its discretion if it denies a defendant's motion to represent himself that is made right before the case is set to be resolved. See *id.* at 25.

¶ 16 With these principles in mind, we turn to the facts presented here. After the State filed its motion to dismiss the first amended petition that defendant's first postconviction attorney filed, defendant filed a motion to withdraw the petition and proceed *pro se*. At a later hearing, where defendant changed his mind more than once about whether to proceed *pro se* and assured the court that he understood that he could not request counsel after being allowed to represent himself, defendant ultimately withdrew his motion, and counsel filed a second amended petition.

After the State moved to dismiss that petition, defendant again sought to represent himself. The court granted that motion, and defendant filed his second *pro se* petition. After the court found that this second *pro se* petition had arguable merit, defendant did not insist that he be allowed to proceed *pro se*. Rather, he asked the court to appoint another attorney to represent him. The court did that, defendant's new attorney filed an extensive amended petition, and a few days before the State was scheduled to file its motion to dismiss, defendant moved for the third time to proceed *pro se*. The court denied the motion, finding that defendant had not made an unequivocal request to represent himself and that defendant's vacillations were coming too late in the proceedings. In doing so, the court determined that it would, in later proceedings, consider the allegations that defendant raised in his *pro se* petition in addition to the ones counsel raised in her amended petition. Defendant then moved the court to reconsider, asking to proceed *pro se* or have the court appoint a third attorney.

¶ 17 Given these events, we simply cannot conclude that the trial court abused its discretion in denying defendant's request to proceed *pro* se. Not only did defendant's actions indicate that he failed to make an unequivocal request to proceed *pro se*, but all of his requests were made after counsel had invested great time in defendant's case, counsel filed a lengthy amended petition, and the State had filed or was set to file a motion to dismiss. Moreover, we note that, unlike in *Gray*, which is the case on which both parties rely, the court here explicitly stated that it considered the allegations raised in both defendant's second *pro se* petition and the amended petition that defendant's second attorney filed. See *Gray*, 2013 IL App (1st) 101064, ¶ 25 (trial court abused its discretion in refusing to allow the defendant to proceed *pro se* on his postconviction petition when, although the request was made late in the proceedings, the request "arose only when counsel finally [and] decisively refused to make or endorse the *pro se*

amendments and the court made clear that it would not consider the amendments under such circumstances"). We also find inconsequential the fact that defendant argued in his motion to reconsider that counsel failed to attach to her amended petition evidence supporting her claims. Not only did this allegation come far too late in the proceedings, but more importantly, both attorneys filed Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificates attesting that defendant's claims were adequately investigated and that necessary amendments were made, and there was an abundance of evidence presented at trial implicating defendant in the crime, including the victims' identification of defendant as the perpetrator and defendant's possession of the victims' stolen property.

¶ 18 In making his argument, defendant mainly focuses on what transpired when he moved to represent himself after his second attorney filed her amended petition. We believe that that focus is too narrow, as the overall context in which the motion was made must be examined. See, *e.g.*, *Mayo*, 198 Ill. 2d at 538; *Burton*, 184 Ill. 2d at 22. In our view, this includes, as relevant here, any earlier motions to proceed *pro se*.

¶ 19 Defendant also intimates that he should have been present when the court ruled on his last motion to proceed *pro se*, and at that proceeding the court should have required defendant to choose between (a) representing himself and filing his own amended petition before a not-too-distant date or (b) withdrawing his motion to proceed *pro se* and proceeding with a hearing on the State's motion to dismiss defendant's second attorney's amended petition. We disagree. Defendant has not cited any authority indicating that a defendant's presence at the hearing on a motion to proceed *pro se* is required. And, given the procedural history of this case, the court was not required to allow defendant to represent himself and delay the proceedings any further.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, the judgment of the circuit court of Du Page County denying defendant's request to proceed *pro se* is affirmed. The State has requested that defendant be assessed $50 as costs for this appeal pursuant to section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)) and *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978). The statute authorizing the fee has been repealed effective July 1, 2019. Given this and as noted in *Nicholls*, the fee is a "relic of another era." *Id*. at 179. However, we remain bound to follow the statute and *Nicholls*. See *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 49-50. Thus, we determine that the State is entitled to the $50 fee.

¶ 22 Affirmed.

¶ 23 Justice McLAREN, concurring in part and dissenting in part.

¶ 24 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 25 However, as I have demonstrated in *Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id*. at ¶ 12 ("The statutory provision

that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 26 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*' faulty premise. The majority here now cites *Knapp* as support for its claim that we are "bound" to follow *Nicholls*, again without addressing *Nicholl*s' lack of a solid foundation. The majority seems content to allow the repeal of the statute to end the misapplication of *Nicholls* rather than address, let alone attempt to reconcile, the *Nicholls* counterfactual. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.