

No. 1-11-1248

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 13876
)	
ROYAL BURCH,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* Dismissal of defendant's postconviction petition was proper where the trial court did not abuse its discretion in accepting his waiver of the right to counsel and granting his request to proceed *pro se*.

¶ 2 Defendant Royal Burch appeals from the dismissal, on motion of the State, of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010).

On appeal, defendant contends that the trial court erred when it did not obtain a knowing and

intelligent waiver of the statutory right to postconviction counsel and thereby "essentially forced" him to proceed on his petition *pro se* after counsel had been appointed.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Following a jury trial, defendant was convicted of felony murder predicated on attempted armed robbery and was sentenced to 40 years in prison. We affirmed defendant's conviction and sentence on direct appeal. *People v. Burch*, No. 1-99-4211 (2002) (unpublished order under Supreme Court Rule 23).

¶ 5 In November 2002, defendant filed a *pro se* postconviction petition. The public defender was appointed in January 2003. On March 10, 2010, defense counsel informed the court that defendant wished to file a motion to have the public defender removed from the case and to have other counsel appointed. The matter was continued to have defendant written in to present his motion.

¶ 6 On March 24, 2010, defendant appeared and was questioned by the court about his motion. The court asked defendant the following questions:

"THE COURT: Do you understand that you're entitled to have a lawyer represent you, do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Are you able to afford a lawyer?

THE DEFENDANT: No, sir.

THE COURT: Do you understand if you're not able to afford a lawyer, that a lawyer will be appointed by the Court to represent you at no cost to yourself, do you understand that?

THE DEFENDANT: Yes, your Honor."

When the trial court asked defendant whether he wanted an attorney from the public defender's office, defendant complained that the public defender's office "has delayed and slowed and refuse[d] to assist me with this petition for over seven and a half years." Defendant stated his belief that there was a conflict of interest because his postconviction counsel asked him to drop his claim of ineffective assistance of trial counsel. The trial court denied defendant's request that he be appointed an attorney other than the public defender. It further stated that the appointment of the public defender would stand unless defendant wished to represent himself. The trial court passed the case to allow defendant to discuss the matter with his attorney.

¶ 7 When the case was recalled, defendant informed the court that he had "opted to excuse the Public Defender's Office." The following exchange ensued:

"THE COURT: You are going to represent yourself?

THE DEFENDANT: Be it that you are not going to allow me to have counsel other than the Public Defender's Office, I will be forced to do so.

THE COURT: All right. Is that what you want to do?

THE DEFENDANT: That is not what I want to do, but I did not want the Public Defender's Office who I believe has a conflict of interest with the claims that I've raised in this amended petition."

After further discussion of defendant's claim of a conflict of interest, the trial court told defendant that it would not appoint an attorney other than the public defender; instead, defendant could accept the public defender, represent himself, or seek private counsel from a free legal clinic or university. Defendant indicated that he wanted to seek alternate counsel. The trial court

granted the public defender leave to withdraw and gave defendant a 90-day continuance to attempt to obtain counsel.

¶ 8 On June 23, 2010, defendant reported that he was unsuccessful in obtaining private counsel. When the trial court asked defendant if he wished to have the public defender re-appointed, defendant answered in the negative. After further discussion, defendant indicated that he would proceed *pro se*. At the next two status dates, the trial court asked defendant if he wanted to continue representing himself, and defendant stated that he did.

¶ 9 In August 2010, defendant filed a pleading titled "*Pro Se* Amended Petition for Post-Conviction Relief." The State filed a motion to dismiss the petition, and defendant sent the State a reply. When the case was called for a hearing on the motion, the trial court confirmed with defendant that he wanted to represent himself. At the conclusion of the hearing, the trial court granted the State's motion to dismiss.

¶ 10 On appeal, defendant contends that the trial court abused its discretion when it did not obtain a knowing and intelligent waiver of his statutory right to counsel and "essentially forced" him to proceed on his petition *pro se* after counsel had been appointed. Defendant argues that the court gave him a "take it or leave it" ultimatum, forcing him to choose between self-representation or continuing with the appointed public defender he wanted removed from the case. He asserts that before allowing him to proceed *pro se*, the court should have ensured his waiver of counsel was knowingly and intelligently made by discussing with him what the right to representation entailed and the dangers and disadvantages of self-representation. In making this argument, defendant relies on a Florida Supreme Court case, *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993). As relief, defendant asks that this court reverse the dismissal of his petition and remand for further proceedings.

¶ 11 Pursuant to section 122-4 of the Act, if a petition drafted by a non-capital defendant survives first-stage dismissal, a defendant may then either proceed *pro se* or with the assistance of counsel. Specifically, section 122-4 provides as follows:

"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).

The Act is clear that the trial court must appoint counsel for a defendant who wishes to have counsel appointed, so requests, and lacks the means to procure counsel. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 22. However, an indigent defendant is not entitled to representation by the counsel of his choice. *People v. French*, 210 Ill. App. 3d 681, 690 (1991). Counsel from outside the public defender's office should be appointed only after a showing of good cause. *Id.* If a defendant wishes to proceed *pro se*, he must knowingly and intelligently waive his right to counsel; that is, the waiver must be clear and unequivocal. *Gray*, 2013 IL App (1st) 101064, ¶ 23. In determining whether a defendant's waiver 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." *Id.* Whether there has been a knowing and intelligent waiver of the right to counsel depends upon the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant. *Id.* We review the trial court's determination for an abuse of discretion. *Id.*

¶ 12 In the instant case, we cannot find that the trial court abused its discretion. When defendant appeared on his motion to have the public defender removed from the case and other counsel appointed, the trial court ensured that he understood he was entitled to have a lawyer represent him at no cost. When defendant complained that the public defender had "delayed and slowed" his case and advised him to drop his claim of ineffective assistance of trial counsel, the trial court explained that the appointment of the public defender would stand unless defendant wished to represent himself. After defendant had a chance to discuss the matter with his attorney, he informed the court that he wanted to excuse the public defender's office. He further stated that if the court would not appoint a different attorney, he would proceed *pro se*. At this point, the trial court granted defendant a 90-day continuance so defendant could seek alternate counsel. When the court reconvened, defendant reported that he was unsuccessful in obtaining private counsel. The trial court asked defendant whether he wanted the public defender re-appointed, but defendant stated he did not. After further discussion, defendant indicated he would proceed *pro se*. At the next two status dates, the trial court asked defendant if he wanted to continue representing himself, and defendant stated that he did. Finally, when the case was called on the State's motion to dismiss, the trial court again confirmed with defendant that he wanted to represent himself.

¶ 13 Here, defendant repeatedly confirmed that he wanted to waive his right to counsel and proceed *pro se*. While defendant's request to represent himself was contingent upon the preclusion of his preferred course – appointment of alternate counsel – that circumstance did not render his request ambiguous. See *Gray*, 2013 IL App (1st) 101064, ¶ 24. Defendant did not vacillate regarding whether he wanted representation. Rather, on five different dates, defendant made it clear that he would proceed *pro se* if he could not have an attorney other than the public

defender appointed for him. Given these circumstances, we find that the trial court did not err in accepting defendant's waiver of the right to counsel and request to proceed *pro se*.

¶ 14 We are mindful of defendant's citation to *Durocher v. Singletary*, 623 So. 2nd 482 (Fla. 1993), as well as his request that this court accept that case's approach to determining whether the waiver of postconviction counsel is knowing, intelligent, and voluntary. In *Durocher*, the defendant had been sentenced to death. *Id.* at 482. A "capital collateral representative" (CCR) was appointed to represent him pursuant to a Florida statute that had been created to provide for the representation of indigent persons sentenced to death. *Id.* at 483. The CCR filed a petition for writ of *habeas corpus* on behalf of the defendant, who thereafter informed the Supreme Court of Florida that he wished to drop all of his appeals and have no motions presented on his behalf. *Id.* The court determined that because the defendant was apparently competent to do so, he could waive his statutory right to representation. *Id.* at 484-85. The court also held that the state had an obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary. *Id.* at 485. Accordingly, the court directed the trial judge "to conduct a *Faretta*-type evaluation of [the defendant] to determine if he understands the consequences of waiving collateral counsel and proceedings." *Id.*, citing *Faretta v. California*, 422 U.S. 806 (1975). *Faretta*, which was founded on the Sixth Amendment, held that in order for a defendant to choose self-representation competently and intelligently, "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

¶ 15 We decline defendant's invitation to adopt the approach in *Durocher*. First, the defendant in *Durocher* had been sentenced to death while the instant defendant was sentenced to a term of

imprisonment. The Illinois Post-Conviction Hearing Act distinguishes these two categories of inmates and treats them differently, granting capital defendants greater rights and legal protections. See 725 ILCS 5/122-2.1 (West 2010). Thus, our legislature did not intend that all postconviction petitioners be treated equally. Second, the defendant in *Durocher* not only wished to waive counsel, but also any further proceedings. In contrast, the instant defendant simply wishes to conduct postconviction proceedings without representation by the public defender. Accordingly, there is no need to determine whether defendant understands the consequences of waiving collateral proceedings. Finally, *Durocher* remanded for a "*Faretta*-type" evaluation of defendant's understanding of the rights he was waiving. As discussed above, *Faretta* involved the waiver of counsel at trial and was grounded in the Sixth Amendment. *Faretta*, 422 U.S. at 807. Here, where defendant has already been tried and convicted, admonishments regarding his Sixth Amendment right to counsel would be nonsensical.

¶ 16 We find no abuse of discretion in the trial court's decision to accept defendant's waiver of counsel and request to proceed *pro se*. For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.