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2014 IL App (3d) 120879-U

Order filed September 18, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0879
v.	)	Circuit No. 07-CF-874
	)	
FRANK J. RUTHERFORD,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice McDade dissented.

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**ORDER**

¶ 1 *Held:* The trial court had authority to dismiss defendant's postconviction petition.

¶ 2 Following a jury trial, defendant was convicted of attempted robbery (720 ILCS 5/8-4(a) (West 2006)). The trial court sentenced defendant to nine years in prison. Defendant's conviction and sentence were affirmed on appeal. *People v. Rutherford*, No. 3-08-0536 (2010) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a *pro se* postconviction petition. The trial court appointed the public defender to represent defendant on

the petition. Appointed counsel then filed a motion to dismiss and for leave to withdraw, asserting that the claims in defendant's petition were frivolous and without merit.

¶ 3 At a hearing on the motion, appointed counsel restated his claim that defendant's petition was frivolous and without merit. After counsel concluded, the court asked for the State's position. The prosecutor said, "We had reviewed the Petition as well and agree with those conclusions by the defense, and so we concur." Following the hearing, defendant's postconviction petition was dismissed by the trial court. Defendant appeals.

¶ 4 ANALYSIS

¶ 5 Defendant argues that the trial court erred when it dismissed his postconviction petition. Specifically, defendant argues that the State failed to move to dismiss the petition and that appointed counsel's motion to dismiss did not grant the court authority to do so. Defendant's argument is based solely on the authority of the trial court to dismiss the petition. Therefore, it is a question of law, and our review is *de novo*. See *People v. Kayer*, 2013 IL App (4th) 120028.

¶ 6 Once an attorney is appointed to represent defendant and the postconviction petition moves to the second stage, section 122-5 of the Code of Criminal Procedure of 1963 mandates that the State either file an answer to the petition or move to dismiss. 725 ILCS 5/122-5 (West 2010). If the State does not move to dismiss, the trial court is not authorized to dispose of a petition on its own initiative. See *People v. Thomas*, 2013 IL App (2d) 120646.

¶ 7 In this case, a motion to dismiss was filed by defendant's appointed counsel, not by the State. However, before the trial court disposed of the petition, the State noted that it agreed with the motion to dismiss and that it concurred in that motion. Because the State noted its concurrence with the motion to dismiss, we believe that it did in fact move to have the petition dismissed. Importantly, section 122-5 does not mandate that the State file a written motion to dismiss, but only that it move to dismiss. See 725 ILCS 5/122-5 (West 2010). Thus, the State's

concurrence in defendant's motion was sufficient to satisfy the State's responsibility under section 122-5.<sup>1</sup> Therefore, we find that the trial court acted within its authority when it disposed of the petition.

¶ 8 CONCLUSION

¶ 9 The judgment of the circuit court of Peoria County is affirmed.

¶ 10 Affirmed.

¶ 11 JUSTICE McDADE, dissenting.

¶ 12 In affirming the circuit court's judgment, the majority relies upon the fact that the State concurred with appointed counsel's motion to dismiss. I dissent on two grounds: (1) I do not believe appointed counsel can file a motion to dismiss his own client's postconviction petition, and (2) alternatively, even if counsel could file such a motion, I do not believe the State's mere concurrence in the filing satisfies the State's duty under section 122-5.

¶ 13 While defendant does contend here on appeal that appointed counsel is not allowed to file a motion to dismiss his own client's post conviction petition, the majority ignores this argument in its entirety. Instead, the majority considers only the secondary issue of whether the State can merely concur with appointed counsel's motion to dismiss when it is up for hearing. The majority's order is incomplete absent analysis of defendant's initial argument.

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<sup>1</sup> The dissent maintains that an appointed defense counsel may not file a motion to dismiss his own client's postconviction petition. *Infra* ¶¶ 12-14. We do not need to reach this issue because we hold that the State's oral motion to dismiss the petition satisfied the requirements of section 122-5. We neither hold nor suggest that the defense counsel acted properly in moving to dismiss his client's postconviction petition.

¶ 14 Under *People v. Greer*, 212 Ill. 2d 192, 209-12 (2004), appointed counsel may seek to withdraw as counsel where she believes defendant's post conviction petition is frivolous or patently without merit. *Greer* does not stand for the proposition that appointed counsel can file a motion to dismiss defendant's post conviction petition. Section 122-5 expressly charges the State with such a duty, not defendant/defense counsel. 725 ILCS 5/122-5 (West 2010). Appointed counsel's dismissal motion in the present case short-circuited the statutorily governed post conviction proceedings. The Post Conviction Hearing Act is entirely a creature of statute, and the legislature has mandated specific requirements with which both the petitioner and the State must comply. *People v. De La Paz*, 205 Ill. 2d 426, 432 (2003). More importantly, however, allowing appointed counsel to file a motion to dismiss his own client's post conviction petition defeats the adversarial process that is the very foundation of our legal system. I would reverse the circuit court's judgment on this basis alone.

¶ 15 Alternatively, even if I were to assume that appointed counsel could file a motion to dismiss, I do not believe the State's mere concurrence in the filing satisfies the State's duty under section 122-5. Unlike the majority, I believe that once the trial court has appointed counsel to assist the defendant, any movement to dismiss must be initiated by the State. Moreover, I believe the State's quest for dismissal must be by written motion.

¶ 16 In coming to this conclusion, I recognize that the first sentence of section 122-5 does not contain the word "written." See 725 ILCS 122-5 (West 2010). However, the second and third sentences of section 122-5 expressly contemplate the filing of a dismissal motion. See 725 ILCS 122-5 (West 2010). Specifically, the first three sentences state:

"Within 30 days after the making of an order pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss. In the event that a motion to dismiss is *filed* and denied, the State must *file* an answer within 20 days

after such denial. No other or further *pleadings* shall be *filed* except as the court may order on its own motion or on that of either party." (Emphasis added.) 725 ILCS 122-5 (West 2010).

¶ 17 I also believe there is a fundamental policy consideration in support of requiring the State to actually file a written motion to dismiss. The filing of a written motion allows the defendant the opportunity to review the motion and respond accordingly. Again, it is important to note that in this particular situation, where counsel has been allowed to withdraw, the defendant will be proceeding *pro se* from that point forward. Allowing the defendant the opportunity to review and actually see *the State's* basis for dismissal allows the defendant to review the relevant law and properly respond. Moreover, requiring the State to file a written motion removes any possibility of the defendant being surprised or caught off guard by the State orally moving while before the circuit court. A written motion would have to be served prior to any dismissal hearing.

¶ 18 For the reasons indicated, I would reverse the circuit court's judgment and remand the matter for further proceedings.