2024 IL App (2d) 220399-U
No. 2-22-0399
Order filed March 11, 2024

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TYNELL DIXON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-1067 Honorable Salvatore LoPiccolo Jr., Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice McLaren concurred in the judgment.
Justice Birkett dissented in the judgment.

ORDER

¶ 1 *Held*: At the second stage of postconviction proceedings, defendant made a substantial showing that appellate counsel was ineffective for failing to argue that the trial court erred in denying defendant's request for substitute counsel. The trial court did not sufficiently inquire into the factual basis of defendant's request, and the record shows neither that defendant used the request as a delaying tactic nor that granting the request would have unduly hampered the administration of justice.

¶ 2 Defendant, Tynell Dixon, appeals from the judgment of the circuit court of Kane County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). Defendant contends that he made a substantial

showing that his counsel on direct appeal was ineffective for failing to argue that the trial court in the underlying case denied his constitutional right to counsel of his choice. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On April 23, 2008, the State charged defendant with eight counts of predatory criminal sexual assault of a child (720 ILCS 12/14.1(a)(1) (West 2006)) and three counts of aggravated criminal sexual abuse (*id.* § 12-16(c)(1)(i)). The offenses allegedly occurred between December 1, 2004, and June 30, 2007. On April 23, 2008, the trial court set bail for defendant. On July 23, 2008, the court appointed Assistant Public Defender Thomas McCulloch to represent defendant. On July 31, 2008, defendant was arraigned and demanded a speedy trial. On August 11, 2008, he was released on bond. He remained out of custody until his trial ended.

¶ 5 The cause was continued from August 11, 2008, to September 25, 2008, and numerous times thereafter. On July 29, 2011, the trial court set December 9, 2011, and December 11, 2011, for pretrial and trial, respectively. All continuances in the case were by an agreed motion of the parties except the continuance from May 8, 2009, to May 27, 2009, and the continuance the court granted on December 2, 2011, based on defendant's November 22, 2011, motion to continue. That motion was filed by Assistant Public Defender Beth Peccarelli, who later represented defendant. The motion stated as follows: McCulloch had retired effective November 1, 2011, and Peccarelli was assigned to defendant's case. Peccarelli had contacted the victim's father in an attempt to interview the victim, and the father had said he might allow the interview. Before being assigned to defendant's case, Peccarelli had scheduled December 5, 2011, for a prescreen for a medical procedure and anticipated that the procedure would occur on December 12, 2011, or immediately thereafter. She requested a continuance because of *her* anticipated unavailability and *her*

"incomplete access to transcripts of important evidentiary proceedings conducted by [McCulloch]." On December 2, 2011, the trial court entered an agreed order granting the continuance. The court set the matter for January 26, 2012, *only* to "reset" the jury trial and noted that the State had answered ready for trial but did not object to the continuance.

¶ 6 On March 9, 2012, the State moved for leave to admit other-crimes evidence against defendant. On March 15, 2012, the trial court continued the cause to April 19, 2012, by agreement.

¶ 7 The common law record contains an order from April 19, 2012, stating that the parties appeared before the trial court and that the case was continued by agreement to May 9 and 11, 2012. The official reports of proceedings contain no report of the April 19, 2012, proceeding (see Ill. S. Ct. R. 323(a) (eff. July 1, 2017)). However, defendant's original and amended postconviction petitions include an excerpt from a purported transcript of the April 19, 2012, proceeding (the excerpt did not contain a certification from the court reporter). The excerpt reflects the following exchange:

> "MS. PECCARELLI [(DEFENSE COUNSEL)]: [Defendant] came in early this *** afternoon to talk to me. He and his family have hired a private attorney, Brian Dosch, out of Chicago. Mr. Dosch was unable to be here today, but he is available to—he has set aside the whole day May 9th and can come to court. I am letting [t]he Court know that, and I have got Mr. Dosch's card that I have Xeroxed.
>
> THE COURT: Until Mr. Dosch decides to come here and until he decides that he wants to take this case on without any further continuances, we are going to keep forging ahead, because we are getting close to half a decade. It's four years old next week.
>
> So if Mr. Dosch wants to come in and represent you, I will not give him a continuance. So you better tell him that, because if he thinks he can come in here two or

three days before we start the jury trial and tell me, oh, I am just coming into this case, Judge, I know nothing about it, then you get a lawyer on trial who knows nothing about your case, because I am not going to grant a continuance.

***

So, Ms. Peccarelli *** is coming in after another lawyer has been able to take the case up to four years old. I am not letting a third lawyer come into the case and tell me I am just coming in[to] this case and I think I need another four or five years to get ready. Okay?

[DEFENDANT]: Okay.

THE COURT: Do you understand that?

[DEFENDANT]: I understand that.

THE COURT: Tell him how serious I am about this. If he wants to come in and he wants to file an appearance, then *** I am happy to have him do that, but then you are set for trial in less than a month.

[DEFENDANT]: I understand that, Your Honor.

THE COURT: He is going to have to shut down his law office and go through all the discovery and look at all the interviews and be ready to go when I call your case on May 11th.[1]

[1]Although the trial court's order of December 2, 2011, states that the court intended to reset the trial date at the next hearing on January 26, 2012, the appellate record contains no report of proceedings or order from January 26, 2012, or any formal resetting of the trial date between the December 2, 2011, and April 19, 2012, hearings. However, the trial court and the parties appeared

Now, what's next?"

¶ 8 On May 9, 2012, the court heard two State motions relating to testimony by minors and evidence of prior convictions of defendant and a defense witness. The State noted that the case was set for pretrial on May 11, 2012. The State said it was ready for trial. The following exchange ensued between the court and Peccarelli:

"MS. PECCARELLI: *** Judge, we did talk to the private attorney and he indicated that without a guarantee that he would get a continuance to prepare, he would not be able to come in. And [defendant] has informed me last night that he did not believe that his attorney was planning to appear because of the inability to have assurances that he would get a new date.

THE COURT: Well, last month we passed four years on this case so I think it's due for a resolution.

Are you prepared then, Ms. Peccarelli?

MS. PECCARELLI: Yes, Judge, I anticipate we will be ready. ***."

The court continued the cause to May 9, 2012, for pretrial and May 14, 2012, for trial.

¶ 9 On May 14, 2012, defendant's jury trial began. On May 17, 2012, the jury found him guilty of all 11 charges. Defendant filed a posttrial motion contending, *inter alia*, that the trial court had denied defendant's constitutional right to counsel of his choice. The court denied the motion. The court then sentenced defendant to concurrent prison terms of natural life on the eight counts of predatory criminal sexual assault of a child and five years on the three counts of criminal

---

to assume at the April 19, 2012, hearing that the case was previously set for trial on May 11, 2012. We assume the same for purposes of this appeal.

sexual abuse. Defendant, represented by new counsel, filed a supplemental posttrial motion that incorporated the contentions of the original. The court denied the motion and also denied defendant's motion to reconsider his sentences.

¶ 10 On direct appeal, defendant was represented by the same counsel who filed the supplemental posttrial motion. Counsel did not raise the counsel-of-choice issue. We affirmed. *People v. Dixon*, 2013 IL App (2d) 120986-U, ¶¶ 1-2, 117.

¶ 11 On October 24, 2014, defendant filed a *pro se* petition under the Act, contending that the trial court denied defendant's constitutional right to counsel of his choice and that defendant's appellate counsel was ineffective for failing to raise this claim. The trial court advanced the proceedings to the second stage under the Act and appointed counsel for defendant. In his second amended petition, defendant reasserted that appellate counsel was ineffective for failing to contend that the trial court denied defendant's right to counsel of his choice.[2] Defendant alleged that, after Peccarelli had spent only about five months as his attorney, he wanted Dosch as counsel instead. Further, although Dosch would obviously need a continuance, the trial court stated flatly that it would not continue the case.

¶ 12 The second amended petition attached affidavits from defendant, Peccarelli, and Dosch. These affidavits were created after defendant's direct appeal; thus, they were not part of the trial court record at that time of defendant's direct appeal.

¶ 13 The second amended petition also attached correspondence between defendant and appellate counsel, to support defendant's allegation that appellate counsel was ineffective for

[2]Defendant also contended that his trial counsel was ineffective for failing to subject the State's case to meaningful adversarial testing. The dismissal of that claim is not at issue here.

failing to obtain complete transcripts of crucial proceedings on April 19, 2012. In a letter dated April 18, 2014, counsel wrote defendant, "You don't need all the transcripts to do a [postconviction petition]. The facts are thoroughly stated in the Briefs and Appellate Court decision. The original transcripts are with the Clerk of the Circuit Court ***. I don't have copies. ***" In a letter dated May 16, 2014, defendant acknowledged receipt of "partial transcripts" from counsel. Defendant disagreed with counsel that defendant did not need all the transcripts to support his postconviction claim that the trial court denied defendant his right to counsel of his choice. Defendant stated that he particularly needed the transcript that "show[ed] how the trial judge stated he would not allow the attorney [whom defendant] retained time to prepare for trial." Also, defendant recalled that, in 2012, counsel told him that counsel would need $1500 to purchase "the trial transcript/record on appeal." Defendant noted that he had paid counsel the $1500 and, thus, wondered why counsel had not purchased the transcripts. Defendant "renew[ed] his request" to counsel "for all [the] transcripts/record on appeal." In a letter dated June 7, 2014, counsel responded that he had obtained the "trial transcripts" but that defendant was now requesting transcripts for "a date prior to trial." Counsel "never ordered that." He directed defendant to contact the court reporters and order copies of the transcripts he wanted.

¶ 14 The State moved to dismiss the second amended petition. Responding to the counsel-of-choice claim, the State argued that, when defendant sought to discharge Peccarelli and hire Dosch, his case had been pending for almost four years and he had been out on bond for nearly as long. Dosch never appeared in court, and the record did not show that defendant was dissatisfied with Peccarelli's representation. Moreover, when defendant first told the trial court that he intended to hire Dosch, Peccarelli was ready for trial. Finally, defendant had not moved in writing to continue the trial, as required by statute (see 725 ILCS 115/114-4(a) (West 2012)). Thus, the State

concluded, there was no merit to the claim that the trial court denied defendant his right to counsel of his choice, and, therefore, appellate counsel was not ineffective for not raising that claim.

¶ 15 The trial court dismissed the second amended petition. On the choice-of-counsel claim, the court noted that a defendant's right to counsel of choice is not absolute but may be denied when exercising that right would unduly interfere with the judicial process. *People v. Montgomery*, 2203 IL App (3d) 200389, ¶ 19. The court noted that Dosch never filed an appearance, a motion for substitution of counsel, or a motion to continue the case. He did not appear in court on either April 19, 2012, or May 9, 2012. Peccarelli also failed to move to continue the case. Moreover, defendant had been out of custody from August 2008 through his trial and failed to exercise due diligence in obtaining new counsel. Defendant never expressed dissatisfaction with Peccarelli's representation or articulated why he wanted new counsel. Also, nothing in the record showed that defendant had any difficulty cooperating with Peccarelli, who had represented him for about six months when she first told the court that he wanted Dosch to represent him.

¶ 16 Defendant timely appealed from the dismissal of his second amended petition.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant contends that he made a substantial showing that his counsel on direct appeal was ineffective for failing to claim that the trial court denied his constitutional right to counsel of his choice. For the following reasons, we agree, and we reverse and remand.

¶ 19 At the second stage of proceedings under the Act, the defendant's petition must make a substantial showing of a violation of a constitutional right. *People v. Mahaffey*, 194 Ill. 2d 154, 171 (2000). We review *de novo* the second-stage dismissal of a petition under the Act. *Id.* In doing so, we accept all well-pleaded facts as true unless the record positively refutes them. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 20 To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable and (2) it is reasonably probable that absent counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). *Strickland* applies to both appellate and trial counsel. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010).

¶ 21 Defendant contends that the second amended petition, together with the trial court record and the affidavits of defendant, Dosch, and Peccarelli, shows that appellate counsel was ineffective for failing to raise the counsel-of-choice issue. However, appellate counsel cannot be found ineffective based on the affidavits which were not a part of the record on appeal, we therefore disregard them and evaluate counsel's performance, and any resultant prejudice, based solely on what the record on appeal enabled counsel to do. *People v. Canulli*, 341 Ill. App. 3d 361, 367-68 (2003).

¶ 22 A defendant has the constitutional right to counsel of his choice. *People v. Curry*, 2013 IL App (4th) 120724, ¶ 48. The right is fundamental yet limited. *People v. Burrell*, 228 Ill. App. 3d 133, 141-42 (1992). The defendant may not use the right as a weapon to thwart the administration of justice. *Curry*, 2013 IL App (4th) 120724, ¶ 48. Thus, the trial court has discretion to determine whether the defendant's right to select counsel would unduly interfere with the orderly process of judicial administration. *Burrell*, 228 Ill. App. 3d at 142. The trial court's denial of the right to select counsel will not be overturned on appeal absent an abuse of discretion. *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000). The factors bearing on whether a request for new counsel is a mere delaying tactic include (1) whether the defendant articulates an acceptable reason for wanting new counsel, (2) whether the defendant has continuously been in custody, (3) whether the defendant informs the trial court of his efforts to obtain counsel, (4) whether the defendant has cooperated

with his current counsel, and (5) how long current counsel has represented the defendant. *People v. Ramsey*, 2018 IL App (2d) 151071, ¶ 24.

¶ 23 We hold that defendant has made a substantial showing that his appellate counsel was ineffective for failing to argue that the trial court denied defendant of his right to counsel of his choice. We base this holding on two intertwined considerations. First, the trial court did not inquire sufficiently into defendant's request to be represented by the identified counsel of his choice. Second, based on the limited record defendant could make because of the trial court's summary rejection, defendant's request for leave to obtain counsel of his choice was not a delaying tactic and would not have unduly interfered with the administration of justice.

¶ 24 Defendant cites two cases, *People v. Adams*, 2016 IL App (1st) 141135, and *People v. Bingham*, 364 Ill. App. 3d 642 (2006), that are factually analogous here. In *Bingham*, the defendant was charged with traffic offenses. *Bingham*, 364 Ill. App. 3d at 643. Two weeks later, the trial court appointed the public defender to represent him. *Id.* Three months after the charges were filed, the case was called for a jury trial. *Id.* At that hearing, the defendant's attorney told the court that the defendant wanted a continuance because he desired to switch to a private attorney already representing him in other proceedings. *Id.* at 644. The private attorney was not present in court. *Id.* The State objected to the motion, noting that it was ready for trial and that, at a prior status hearing, the defendant also had answered ready for trial. *Id.* The State noted that it had tried to contact the private attorney but could not get him to appear in the case. *Id.* After that short colloquy, and with no further inquiry, the trial court denied the defendant's motion. *Id.* The defendant was convicted and sentenced. *Id.*

¶ 25 There, the reviewing court held that, given the importance for criminal defendants of the right to counsel of one's choice, the trial court abused its discretion in denying the defendant's

motion. *Id.* at 645. The court noted that the private attorney the defendant wanted was already representing him in other cases; the attorney had contacted the State the day before the trial date; the case had been progressing rapidly and was only three months old; no prior continuances had been granted; the defendant had engaged in no prior dilatory tactics; and there was no indication that his motion had a dilatory purpose. *Id.* The court explained that the trial court "should have conducted an inquiry into the circumstances and the purposes of the motion before making its ruling." *Id.* The court concluded that the trial court abused its discretion by failing to make that inquiry. *Id.* The court further held that the defendant's right to counsel of his choice was so fundamental that the violation required reversal regardless of prejudice. *Id.* at 648.

¶ 26 *Adams* involved a similar procedural failure. There, the defendant was charged with a drug offense. *Adams*, 2016 IL App (1st) 141135, ¶ 4. At his arraignment, the trial court appointed the public defender to represent him. *Id.* Seventy days later, on the date scheduled for his bench trial, the defendant requested a continuance to hire a private attorney, explaining that his public defender "didn't let [him] know anything." *Id.* The trial court denied the request because it was made on the day of trial and the State's two witnesses (police officers) were present. *Id.* The appellate court reversed the defendant's conviction, holding that the trial court erred in failing to inquire into whether the defendant was using the request for new counsel as a delaying tactic. *Id.* ¶ 17.

¶ 27 Here, defendant made a substantial showing that (1) the trial court abused its discretion in failing to inquire into the circumstances surrounding his request to be represented by Dosch and (2) the balance of the relevant factors militated in favor of granting the request. Thus, defendant made a substantial showing that appellate counsel was ineffective in forgoing the counsel-of-choice issue.

¶ 28 Defendant made his request 22 days before the scheduled trial date. Instead of inquiring further into the request—particularly, into why defendant wanted to discharge Peccarelli and hire Dosch—the trial court relied on the facts that the case had been pending for four years and was scheduled for trial within a month. Although defendant did state that Dosch would need a continuance, the trial court did not inquire into how much more time would be needed. Instead of attempting to ascertain defendant's reasons for wanting to incur the expense of private representation, the court summarily and emphatically denied the request based solely on the time factor.

¶ 29 We acknowledge that the case was pending for about four years as of April 19, 2012. However, this was not the result of any dilatory tactics or other fault of defendant. The numerous continuances were almost all by agreed motion. Of the two on defendant's motion, the first was for 19 days. The second was for less than two months and was generated by Peccarelli due to *her* pending medical procedure, *her* recent assignment to defendant's case, and *her* need to review the case. The motion was granted with the State's acquiescence shortly after McCulloch had retired and was replaced by Peccarelli. We simply cannot conclude that defendant needlessly stretched out the proceedings before requesting substitute counsel.

¶ 30 The balance of the pertinent factors (*supra* ¶ 22) does not support the trial court's refusal to allow defendant to exercise his right to counsel of choice. The first factor, whether defendant articulated an acceptable reason for wanting new counsel, surely cannot be held against him, since the trial court's summary rejection of defendant's request prevented him from explaining why he wanted new counsel. The second criterion, whether defendant had been in custody, arguably cut against defendant's request. However, although defendant had been out of custody since early in the case, fewer than six months had passed since McCulloch retired and was replaced by Peccarelli,

the attorney defendant wanted to discharge in favor of Dosch. The third factor, whether defendant informed the trial court of his efforts to obtain counsel, does not support the trial court's decision. Defendant identified his choice of attorney (Dosch), stated that he had actually hired Dosch, and provided the court with Dosch's business card. Defendant also stated that Dosch could appear in approximately three weeks, which would be *before* the scheduled trial date. The fourth factor—whether defendant had cooperated with his current counsel—in effect, is similar to the first factor: by preventing defendant from explaining or supporting his request, the trial court made it impossible for him to address this factor. Finally, the fifth factor, how long defendant had been represented by his current counsel (about six months), does not clearly support the trial court's decision.

¶ 31 As against this nebulous evidence of either a dilatory intent or a likelihood that a change of counsel would cause unreasonable delay, the following facts clearly supported defendant's request. Despite the extra cost of private counsel, defendant unequivocally expressed his strong desire for a new attorney. He identified the attorney, Dosch, and told the court that Dosch had been informed of the nature of the charges against defendant. Although Dosch would have been defendant's third attorney in the case, the other two had been assigned to him, and Peccarelli's entry into the case was occasioned solely by the happenstance of McCulloch's retirement.

¶ 32 Finally, the consequences of granting the request, even with a continuance, would not have been so onerous as the trial court apparently assumed. Although the court stated that it was unwilling to have the new attorney "tell me [that] I am just coming in[to] this case and I think I need another four or five years to get ready," the record shows the hyperbole of this remark. Peccarelli was assigned to the case in November 2011, and, on May 9, 2012, she stated that she would be ready for trial on May 11, 2012. The trial was held on May 14, 2012, approximately

half a year after Peccarelli took the case. This was far less than the "four or five years" the court said Dosch would need. There was no reason to believe Dosch would need more time than Peccarelli.

¶ 33 We add that defendant faced charges that made him eligible for life imprisonment—indeed, he ultimately received that sentence. As he was faced with such a dire prospect and clearly believed that he needed new counsel to address it, an extra half-year to prepare as he saw fit was not an onerous burden on the criminal justice system.

¶ 34 The State relies on the holding of *Segoviano*, 189 Ill. 2d at 245, that "a trial court will not be found to have abused its discretion in denying a motion for substitution of counsel in the absence of ready and willing substitute counsel." In *Segoviano*, however, the court explained that the trial court properly denied the defendant a 21-day continuance to obtain new counsel, as the defendant had not even represented "that substitute counsel had been secured, much less *** that such substitute counsel was ready and willing to enter an appearance in the case." *Id.* Here, by contrast, defendant told the trial court that Dosch had already been hired and was ready to enter an appearance, although he would need a continuance to enter his appearance and be ready for trial.

¶ 35 The State also relies on *Ramsey*, but that case is also readily distinguishable. In *Ramsey*, the defendant had been represented at different times by *several* different attorneys (lastly by the public defender). He had repeatedly failed to appear, appeared late, including the day set for bench trial, and had failed to obtain substitute counsel after being given multiple opportunities and ample time to do so. *Ramsey*, 2018 IL App (2d) 151071, ¶ 3. On the day set for jury trial, the defendant appeared with his public defender and waived his right to a jury trial; the case was held over to the next day for bench trial. The next day, the public defender requested a two-week continuance so that the defendant (who had not yet appeared that day) could be represented by a private attorney,

" 'Mr. Kayne.' " *Id.* ¶ 4. The public defender conveyed that Kayne needed two weeks to prepare for trial. *Id.* The trial court denied the motion based on the timing of the request, conceding it would have been different if the motion had been made earlier but noted it is now 59 minutes past the eleventh hour. The court further noted, there were witnesses in the hallway and granting a continuance on the day of trial would unduly interfere with the administration of justice. *Id.* The court then commenced the trial in the defendant's absence. *Id.* ¶ 5. After the defendant arrived 54 minutes later, the court revisited the request for substitute counsel and again denied it. *Id.* The court noted the defendant's previous dilatory conduct and that the named attorney was not ready to make an unconditional appearance but wanted a continuance. *Id.* ¶¶ 4-5.

¶ 36 In that case, we rejected the defendant's contention that the trial court denied him the right to counsel of his choice. *Id.* ¶¶ 28-30. We explained that substitute counsel had not been "ready, willing, and able" to enter an unconditional appearance. *Id.* ¶ 28. We further noted that the defendant's day-of-trial request was preceded by *repeated* nonappearances and a failure to obtain substitute counsel when given the opportunity. *Id.* We concluded that the trial court properly found that the defendant sought to delay the proceedings again. *Id.* ¶ 30.

¶ 37 *Ramsey* is distinguishable. Although Dosch, like Kayne, requested a continuance, defendant had *no history* of dilatory conduct. Further, defendant made his request not on the day of trial, with witnesses ready and waiting in the hallway, but *three weeks before*.

¶ 38 Finally, the State cites *Curry*. There, on the date scheduled for the defendant's jury trial, his counsel, Harmon, filed a motion to continue the case for the defendant to obtain new counsel. *Curry*, 2013 IL App (4th) 120724, ¶¶ 10-11. The motion stated that, 12 days earlier, the defendant told Harmon that he had hired a new attorney, Frazier. *Id.* ¶ 11. After Harmon unsuccessfully tried to contact Frazier, Harmon filed the motion for a continuance. *Id.* At a hearing on the same

day the motion was filed, Harmon stated that the defendant paid Frazier a retainer the week before, but that Frazier would accept the case only if he received a continuance. *Id.* ¶¶ 11-12. The trial court denied the motion emphasizing that the defendant waited until the *morning of trial* to tell the court that he wanted new counsel and to move for a continuance. *Id.*

¶ 39 On appeal, the defendant, relying primarily on *Bingham*, argued that the trial court denied his right to counsel of his choice. *Id.* ¶¶ 47, 50 (citing *Bingham*, 364 Ill. App. 3d at 642). The appellate court disagreed. *Curry*, 2013 IL App (4th) 120724, ¶ 51. It explained that the trial court, unlike the trial court in *Bingham*, inquired into the factual basis of the defendant's motion for a change of counsel. *Id.* The court also noted that the trial court's inquiry revealed that Frazier was not ready, willing, and able to make an unconditional appearance but sought a continuance. *Id.* ¶¶ 51-52.

¶ 40 Although Dosch, like Frazier, sought a continuance, we cannot ignore the significant respects in which *Curry* differs from this case. First, unlike in *Curry*, the trial court here did not inquire into the circumstances surrounding defendant's motion for change of counsel. Second, defendant made his request for new counsel not on the day of trial but three weeks before.

¶ 41 Finally, we note that appellate counsel did not order the pretrial transcript for April 19, 2012, the date on which defendant's request for new counsel was made. This transcript is referenced here only as an unofficial transcript, which together with counsel's correspondence with defendant regarding the lack of need for pretrial transcripts leads us to conclude that counsel never ordered them nor reviewed the circumstances of defendant's request for new counsel. We fail to see how appellate counsel could have evaluated this properly preserved issue without the assistance of this transcript.

¶ 42 Accordingly, we conclude that defendant made a substantial showing that his appellate counsel was ineffective for failing to contend that the trial court denied his right to counsel of his choice.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we reverse the judgment of the circuit court of Kane County and remand for third-stage proceedings under the Act in accordance with this order.

¶ 45 Reversed and remanded.

¶ 46 JUSTICE BIRKETT, dissenting.

¶ 47 Defendant has failed to make a substantial showing that appellate counsel on direct appeal was ineffective for failing to raise the claim that defendant was denied the right to counsel of his choice. Applying the *Strickland* test to defendant's argument, it is clear that counsel on direct review was not "objectively unreasonable" by failing to argue that defendant was denied the right to counsel of his choice. *People v. Richardson*, 189 Ill. 2d 401, 412 (2000). "The sixth amendment right to effective assistance of counsel does not mandate that appellate counsel raise every conceivable argument that might be made. Appellate counsel's assessment of what to raise will not be questioned unless it is patently wrong." *Id.* (citing *People v. Madej*, 177 Ill. 2d 116 (1997); *People v. Frank*, 48 Ill. 2d 500, 505 (1971).

¶ 48 The State cites *People v. Vasquez*, to argue that defendant has forfeited his claim that appellate counsel was ineffective for failure to raise the right to counsel of choice because he has failed to provide a sufficient record on appeal. 388 Ill. App. 3d 532, 544 (2009) (any doubts that arise from the incompleteness of the record will be resolved against the appellant) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). As the State and the majority note, only part of the transcript for the date of April 19, 2012, was attached as an exhibit to defendant's postconviction

petition and amended petition.[3] Defendant argues in his opening brief that the quoted exchange in the April 19, 2012, hearing and the trial court's comments "had the effect of denying the petitioner's right to counsel of his choice, and that Doherty both acted unreasonably and prejudiced the petitioner when he failed to raise that claim on direct appeal." The State points out that the transcript from May 9, 2012, shows that the trial court had specially set the case for status on the substitution of counsel issue. When the case was called, the Assistant State's Attorney stated, "Judge, I believe today's date was for status of Mr. Dixon was going to retain a private attorney [*sic*]. I think our pretrial is set for Friday[,] but I understand your Honor is not going to be here Friday." The trial court said it would accept the State's witness list and jury instructions on Monday and then asked, "And Ms. Peccarelli, you are still the lawyer up until the last day before?" Ms. Peccarelli responded:

> "Yes. Judge, we did talk to the private attorney[,] and he indicated that without a guarantee that he would get a continuance to prepare, he would not be able to come in. And Mr. Dixon has informed me last night that he did not believe that his attorney was planning to appear because of the inability to have assurances that he would get a new date."

The trial court commented, "Well, last month we passed four years on this case so I think it's due for a resolution. Are you prepared then, Ms. Peccarelli?" Peccarelli responded, "Yes, Judge, I anticipate we will be ready." Peccarelli filed her original subpoenas. The State then reminded the trial court that there were two unresolved motions *in limine* to address. One of the motions

[3]The common law record shows that, on March 15, 2012, the court scheduled the case for April 19, 2012, for hearing on the State's motion to introduce evidence of other sex offenses. 725 ILCS 5/115-7.3 (West 2012).

involved the State's motion *in limine* to use a prior conviction to impeach defendant. Ms. Peccarelli stated, "Judge, I just have to confirm. I brought a very limited file because I was *only here to address the private attorney issue*." (Emphasis added.)

¶ 49 The record shows that, other than the limited portion of the transcript from April 19, 2012, there was further discussion and the case was specifically scheduled to address the issue of substitute counsel. The State's argument that defendant has forfeited the issue is well founded. In the absence of a sufficiently complete record, we presume that the trial court's order "was in conformity with the law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92.

¶ 50 In his reply brief, defendant argues that the State could have filed an answer "alerting the post-conviction judge to any contextual comments that might have changed the meaning of the comments in the petitioner's excerpt." It is the appellant's burden, not the appellee's, to provide a sufficiently complete record.[4]

¶ 51 The trial court entered two orders on April 19, 2012. One order reflects the trial court's ruling on the defendant's motion to sever and its ruling on the State's motion to admit uncharged conduct undersection 115-7.3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.3 (West 2012)). As to both rulings, the order states, "[S]ee record for detailed ruling." The other order entered on April 19 is a scheduling order with boxes to check. The order reflects that defendant was advised in open court as to trial "*in absentia*;" that the case was continued to May 11, 2012, for "pre-trial *status*" and also continued to "May 9, 2012." (Emphasis added.)

[4]The majority fails to discuss the State's forfeiture argument. Supreme Court Rule 23 admonishes the appellate court to set forth the reasons for its decision. *Siegel v. Levy Organization Development Co., Inc.*, 153 Ill. 2d 534, 544-45 (1992).

¶ 52 Based on comments of both defense counsel and the Assistant State's Attorney on May 9, it is clear that the trial court had not ruled on either allowing Mr. Dosch to file his appearance or whether to grant a continuance. In the absence of a sufficiently complete record, we must presume that "the trial court acted in conformity with the law and ruled properly after considering the motion." *Foutch*, 99 Ill. 2d at 391. Of course, in this case, there was no motion filed. Defendant's position that he should be excused from furnishing a complete transcript of the April 19 proceeding because the State "will have another opportunity to present any transcripts of additional comments by the judge" at a third stage hearing is no excuse. We have held that "the affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). Additionally, Illinois Supreme Court Rule 323 (eff. July 1, 2017) provides that "[t]he report of proceedings shall include *all* of the evidence pertinent to the issues on appeal." (Emphasis added.) Postconviction counsel had more than six years to obtain the complete transcript of the April 19, 2012, proceedings and to attach it to the amended petition. I find it appalling that defendant claims counsel on direct review was ineffective for failing to order the transcripts from April 19, 2012, when neither he nor postconviction counsel attached the complete transcripts from that date to his petition. A defendant is entitled to an evidentiary hearing if he/she makes a substantial showing of a constitutional violation. The substantial showing required "is a measure of the legal sufficiency of the well-pled allegations of a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 35. Section 2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2 (West 2020)) requires that a defendant's "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." Defendant fails to provide any explanation or plausible excuse why the full

transcript from the April 19 proceedings is not attached to his petition. Without providing the full transcript of the April 19 proceedings, I would find that defendant's allegation that he was denied the right to counsel of his choice is not a well pleaded allegation.

¶ 53 Forfeiture aside, even if I considered the exchange from April 19, 2012, defendant has not made a substantial showing that counsel on direct review was ineffective for failing to argue that the trial court denied defendant the right to counsel of his choice. "A defendant's constitutional right to the assistance of counsel [citations] includes the right to retain defendant's counsel of choice." *People v. Heredia-Rios*, 2023 IL App (3d) 220380-U, ¶ 9. However, that right "is subject to forfeiture when a defendant abuses the right 'in an attempt to delay trial and thwart the ineffective administration of justice.' " *Id.* (citing *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008)). "It is within the trial court's discretion to determine whether the defendant's right to selection of counsel unduly interferes with the orderly process of judicial administration." *Tucker*, 382 Ill. App. 3d at 920. Courts are given great deference in balancing a defendant's right to counsel of choice against ideas of fairness and the demands of its calendar. *Heredia-Rios*, 2023 IL App (3d) 220380-U, ¶ 9. A reviewing court shall not overturn the denial of a continuance for substitution of counsel absent an abuse of discretion. *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000). In evaluating the court's exercise of discretion, we examine the diligence of the party seeking a continuance, a defendant's rights to a speedy and fair trial, and the interests of justice. *Id.* Courts of review should also analyze whether a defendant's request for a continuance to obtain new counsel is a front for a delay tactic. *People v. Roberts*, 2021 IL App (3d) 190445, ¶ 35. In determining as much, courts should consider (1) whether the defendant has articulated an acceptable reason for obtaining new counsel, (2) whether the defendant has continued to remain in custody, (3) whether the defendant has informed the trial court of his or her efforts to obtain

counsel, (4) whether defendant has cooperated with his or her current counsel, and (5) the duration of time that defendant has been represented by his or her current counsel. *People v. Tucker*, 382 Ill. App. 3d 916, 920 (2008). A trial court does not abuse its discretion in denying a motion for substitution of counsel "in the absence of ready and willing substitute counsel." *Segoviano*, 189 Ill. 2d at 245.

¶ 54 "A defendant who claims that appellate counsel was ineffective must show that the failure to raise an issue was objectively unreasonable and the decision prejudiced the defendant." *People v. Johnson*, 205 Ill. 2d 381, 405-06 (2002). "Appellate counsel's choices concerning what issues to raise are entitled to substantial deference." *People v. Mack*, 167 Ill. 2d 525, 532-33 (1995). "[I]n order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Manning*, 241 Ill. 2d 319, 327 (2011). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* (quoting *People v. West*, 187 Ill. 2d 418 (1999)).

¶ 55 The record in this case shows that, more than a year before the scheduled trial date of May 14, 2012, the trial court expressed its concern about the age of the case. On April 27, 2011, the trial court heard testimony on the State's motion to introduce statements of the victims under section 115-10 of the Code (725 ILCS 5/115-10 (West 2010)). The trial court said that it had 35 pages of notes to review, specifically stating, "[A]nd why don't we look to your books. This case is now three years old this month. So let's get you on schedule for trial. Suggested month?" The parties agreed to a schedule of July 29, 2011, for final pretrial, and August 8, 2011, for jury trial. The trial court issued its ruling on the State's section 115-10 motion on May 13, 2011.

¶ 56 The majority notes that defendant's first attorney, Deputy Public Defender Tom McCulloch, retired on November 1, 2011, and was replaced by Deputy Public Defender Beth Peccarelli. There are no transcripts in the record for court dates after May 13, 2011, until May 9, 2012. The order entered on July 29, 2011, shows that the case was scheduled for pretrial on December 9, 2011, and December 12, 2011, for jury trial by agreement. As the majority notes, defendant's motion to continue was by agreement although the State answered ready for trial. The record shows that, on March 9, 2012, the State filed its motion to introduce other sex crimes evidence pursuant to section 115-7.3 of the Code. On March 15, 2012, the case was continued to April 19, 2012, for "hearing on the motion for 7.3" On March 16, 2012, Ms. Peccarelli filed defendant's motion to sever counts, arguing that there should be separate trials for the counts that apply to each victim because defendant would be prejudiced otherwise. In the alternative, the motion argued that the State's motion to admit other sex crimes evidence should be denied. On April 13, 2012, Ms. Peccarelli filed "Defendant's Disclosure to the State," listing ten potential witnesses. Also on April 13, 2012, the State filed its amended motion pursuant to section 115-7.3 of the Code, along with copies of the relevant statutes and case law.

¶ 57 On April 19, 2012, defendant informed Ms. Peccarelli, for the first time, that "he and his family have hired a private attorney." The trial court's initial reaction is understandable in light of the fact that the case had been scheduled for hearing on pretrial motions and trial was scheduled to begin May 14, 2012. Mr. Dosch's affidavit states that he "was contacted by" defendant in March of 2012. Yet, Mr. Dosch made no effort to file an appearance or seek a continuance of the trial date. It is also clear that any discussion that Dosch had with either the State or Ms. Peccarelli took place after April 19, 2012, because Peccarelli continued to diligently prepare for trial. If she had known defendant was hiring private counsel, she would have notified the trial court and the State.

¶ 58 While we do not know whether the trial court found a lack of diligence on the part of defendant, the record clearly indicates that defendant never told Peccarelli about Dosch until the day of the hearing on April 19, 2012. This fact alone demonstrates a lack of diligence on defendant's part. The trial court could have reasonably concluded that the suggestion of new counsel was not sincere and was made for the purpose of delay. *Friedman*, 79 Ill. 2d 341, 349 (1980).

¶ 59 Attorney Dosch never filed a motion for substitution of counsel. Dosch never filed a motion to continue the trial. Likewise, Ms. Peccarelli never filed a motion to continue when she learned defendant was pursuing private counsel. If Ms. Peccarelli believed a continuance was necessary in order to secure defendant's right to counsel of his choice, she would have filed such a motion. Instead, she continued to prepare for trial and Mr. Dosch decided he could not stand ready, willing and able to file his appearance. The "defendant's chosen counsel must stand 'ready, willing and able' to provide competent representation." *People v. Baez*, 241 Ill. 2d 44, 106 (2011) (citing *Tucker*, 382 Ill. App. 3d at 920.

¶ 60 Substantial precedent from both our supreme court and the appellate court stand for the proposition that, to avoid trial delay, a trial court "does not abuse its discretion in denying a defendant a continuance to obtain substitute counsel where new counsel is unidentified or does not stand ready, willing and able to make an unconditional entry of appearance on defendant's behalf." *People v. Staple*, 402 Ill. App. 3d 1098, 1103 (2010); *Segoviano*, 189 Ill. 2d 228; *People v. Ramsey*, 2018 IL App (2d) 151071, ¶ 25. As this court recently stated, "if new counsel is specifically identified and stands ready, willing, and able to enter an unconditional appearance, the motion should be allowed. However, *if any* of those requirements are lacking, a denial of the motion is not an abuse of discretion." *Ramsey*, 2018 IL App (2d) 151071, ¶ 25.

¶ 61 The cases cited by the majority to support its holding are easily distinguishable. In *People v. Adams*, 2011 IL App (3d) 141135, defendant was charged with delivery of a controlled substance. The case had been pending for less than three months. Trial was held on the 61st day after arraignment and was scheduled for a bench trial. Adams had been in custody since his arrest, "which limited his opportunity to seek and obtain counsel." Adams complained on the record about the public defender who represented him. *Id.* ¶ 4.

¶ 62 Similar to *Adams*, in *People v. Bingham*, the defendant was charged with aggravated fleeing and eluding. The case had been pending for less than three months. New counsel had already been representing the defendant in other cases. There had been no previous continuance for trial. The trial court denied the request without inquiry.

¶ 63 "The determination of whether the denial of a continuance violates a substantive right of the accused must turn on the particular facts of each case." *People v. Friedman*, 79 Ill. 2d 341 (1980). In this case, the defendant was out on bail for all but about four months of the four plus years it took to get the case to trial. The State listed twenty-two witnesses, including the child victims. Defendant never expressed any dissatisfaction with Ms. Peccarelli on the record. Contrary to the majority's conclusion, the trial court did not "summarily and emphatically" deny defendant's request "based solely on the time factor." *Supra* ¶ 28. The trial court specially set the case, at defendant's request, for May 9, 2012, for Mr. Dosch to appear. Mr. Dosch failed to appear. Given these facts, appellate counsel's decision not to raise the issue on appeal was not "patently wrong." Therefore, I respectfully dissent.