No. 1-08-2524

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SIXTH DIVISION
MARCH 25, 2011

IN
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. 06 CR 220656
	)	
LIZELL BRYANT,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
PRESIDING JUSTICE GARCIA and JUSTICE McBRIDE concurred in the judgment.

ORDER

Held: The trial court did not err when it dismissed defendant's post-conviction petition before the State filed an answer or motion to dismiss when defendant claimed ineffective assistance of counsel on bare allegations of a conflict of interest.

Following a bench trial in the circuit court of Cook County, defendant Lizell Bryant, age 56, was convicted of attempted first degree murder [720 ILCS 5/8-4, 9-1(a)(1) (West 1998)] and aggravated battery [720 ILCS 5/12-4(a) (West 1998)] of his wife Evelyn Bryant. After hearing aggravation and mitigation, the trial court sentenced defendant to 60 years in the Illinois Department of Corrections. Defendant appealed and we affirmed the convictions but remanded

for a new sentence hearing pursuant to Apprendi v. New Jersey, 530 U.S. 66, 147 L. Ed. 435, 120 S. Ct. 2348 (2000). People v. Bryant, 325 Ill. App. 3d 448 (2001). The trial court held a re-sentence hearing where defendant was not represented by counsel and his sentence was reduced to 30 years. Defendant again appealed, the State confessed error, and we revacated the sentence and remanded for a second re-sentencing hearing. People v. Bryant, No. 1-04-2961 (2005) (unpublished order under Supreme Court Rule 23). After hearing only mitigation, the trial court again sentenced defendant to 30 years, and we affirmed. People v. Bryant, No. 1-06-1990 (2008) (unpublished order under Supreme Court Rule 23). During the pendency of defendant's initial appeal, defendant filed a post conviction petition that the trial court dismissed as being "untimely." Defendant again appealed. On appeal, the State confessed error and we remanded for further post conviction proceedings. People v. Bryant, No. 1-02-2848 (2003) (unpublished order under Supreme Court Rule 23). Following remand, defendant filed a supplemental petition and the public defender's office was appointed and later withdrew, and defendant ultimately represented himself. The trial court dismissed defendant's post-conviction petition stating that it failed to state "a meritorious claim for relief." Defendant now appeals arguing that 1) the trial court erred by depriving defendant the right to counsel on his post conviction petition and 2) the trial court erred in dismissing defendant's post conviction petition *sua sponte.* We affirm.

BACKGROUND

In 1998, defendant was indicted on several charges, including attempted first degree murder and aggravated battery of his wife Evelyn Bryant. At his first trial, the jury returned a verdict of guilty for aggravated battery but was hung on the attempted murder charge. Defendant's motion for a new trial was granted, and his second trial was a bench trial.

A. Bench Trial

The evidence at defendant's bench trial revealed the following: Defendant's wife, Evelyn Bryant ("victim"), testified for the State that she and defendant married in 1991 but separated in 1997. The victim moved out of their home and into a studio apartment in Des Plaines on East Ashland Avenue while defendant purchased a two flat apartment building in Joliet. While separated, the victim continued to interact with defendant and testified to spending some weekends and nights with him.

On the evening of October 20, 1998, the victim testified that defendant arrived in Des Plaines around 10 p.m., and she invited him into the apartment. The victim testified that defendant become violent and hit her on her head causing her to fall to the floor. Defendant then sat on her back and continued beating her with his fists. Defendant hit the victim over the head several times with a vase and a brass candlestick. During this incident, defendant told her that she was going to die, that if anyone came to the door he would kill her, and he hoped she had said goodbye to her grandchildren. The victim testified that she tried to defend herself by covering her head with her hands and asked him why he was doing this to her, but defendant continued to hit her and at one point covered her face with pillows.

When defendant stood up and walked toward the kitchen, the victim testified that she ran for the door, but defendant stopped her and stabbed her twice in the chest with a kitchen knife. In the process, she grabbed the blade with her hand and tried to bend it back towards defendant. The victim testified that she bit defendant and he bit her back. She was then able to take control of the knife and ran to the kitchen to call the police. Defendant reached the phone first, pulled it off the wall, and threw it to the floor. She screamed at defendant to leave, but he stood in front of

the door and asked her why she made him do this to her. The victim testified that defendant then left, and she went to a neighbor's apartment for help. When the police arrived, the victim gave them defendant's address and a description of his automobile.

On cross examination, the victim testified that she did not remember if the dining room table had been turned over during the struggle, and she did not cut defendant with a knife. The victim denied knowing about a woman named Laura Williams or that defendant had a girlfriend during their separation. She recalled seeing a card at his apartment from Laura but believed defendant when he told her the card was for his son. She denied accusing defendant of having an affair with Williams or other women, but admitted that her daughter had seen him with another woman.

Des Plaines Police Officers Jeff Rotkovich and Jeff Jacoby ("Officer Rotkovich" and "Officer Jacoby") testified that they responded to East Ashland Avenue and observed a woman lying in a pool of blood. Both observed a knife on the floor near her left hand. Officer Jacoby searched the apartment and noticed blood on the walls, a vase and a pillow. The living-room table was turned over and the wall telephone was on the floor.

After defendant was arrested a few hours later, Officer Rotkovich observed cuts and scrapes on defendant's arm and hand and a bite wound on his thumb, but no knife wounds. Officer Rotkovich testified that defendant was not taken to the hospital. On cross-examination, Officer Rotkovich testified that blood was found in defendant's vehicle and on a napkin located on the front seat.

The parties stipulated that the testimony of Dr. Rabih Salloum ("Dr. Salloum"), a trauma surgeon at Lutheran General Hospital who testified at defendant's first trial, would be admitted

into evidence. Dr. Salloum testified that the victim suffered lacerations to her head, multiple bruises to her back, cuts on her hand and fingers, and two stab wounds to the chest. In his opinion, any of those injuries could have been fatal. He opined that the victim's hand injuries were sustained when she tried to push a knife or sharp object away from her.

The parties also stipulated that Joliet Police Officer Badertscher's ("Officer Badertscher") testimony from the first trial would be admitted into evidence. There, he testified that when he apprehended defendant in Joliet he noticed defendant's hand was bleeding and blood on a napkin and clothing in the front seat of defendant's automobile. Defendant told Officer Badertscher that he did not do anything.

Robert Wijas ("Wijas") next testified that he was visiting his girlfriend at her East Ashland Avenue apartment on October 20, 1998, when he heard a woman screaming around 10 p.m. After about 20 minutes, he twice heard the woman ask someone to leave. He then heard a door slam and observed a man leave the building and enter a Chevy Blazer. Wijas called the police and later determined that the screaming came from the victim's apartment. He never heard a man's voice.

Michael Roston ("Roston") testified for the defense that he owns Roston Corporation, where defendant worked for 10 years running errands and delivering mail. In the summer of 1998, defendant came to work with bruises and scratches on his face. Roston believed defendant when he said that he sustained the injuries falling off his bicycle. Defendant's mother, Ida Conner, testified that she visited defendant in the hospital once, and she believed him when he told her he had fallen off his bicycle.

Defendant next testified on his own behalf. He testified that he and the victim both used the Des Plaines apartment during the week and stayed in Joliet on the weekends. In February 1998, defendant spent the weekend in Joliet while the victim remained in Des Plaines. When he returned to Des Plaines on Monday, defendant testified that the victim was upset and "jumped on [him]." He started to take his clothes and leave when the victim ripped the clothes out of his arms, tore his shirt and hit him. He pushed her off and left. Defendant returned to the apartment with a police officer and picked up his clothes. The parties later "made up."

Defendant testified that on October 19, 1998, he spoke with the victim, who was unhappy that she was to babysit her grandchildren that night. Defendant testified that the victim said she wished for a gun to end everything because she was tired of him and her grandchildren and wanted to go away.

He testified that on October 20, 1998, he spoke with the victim during the day as usual. She was upset that she had to watch her grandchildren that evening in Des Plaines while defendant would be in Joliet. That evening, defendant testified that the victim called him several times asking what he was doing and when he was returning. Defendant left Joliet at about 8:45 p.m. and stopped for gasoline and food. When he arrived in Des Plaines, defendant testified that the victim asked him where he had been. He stated he had been on his way, but she responded that the drive was not that long and accused him of having affairs, which he denied.

Defendant testified that the victim then took a knife and said that he was probably sleeping with "Laurie," someone defendant met while he and the victim were separated. She tried to stab him, and when he attempted to grab her arm, he felt the knife cut his hand. He testified that as he left the kitchen and hit the dining-room table, the victim cut his arm.

Defendant then testified that he punched her in the face a few times and told her to release the knife, but she refused. Defendant placed her in a "half nelson" position while he was standing behind her. The victim bit him in the thumb so he bit her on the shoulder. She escaped and threw a vase at him, and he threw it back at her. Defendant testified that he pushed the victim to the floor while she repeatedly told defendant she was going to kill him. He testified that he picked up a candlestick and hit her on the back and the neck. When she raised her hands to her head, he hit her hands until she surrendered. He asked her why she was doing this and she said that he did not care about her. Defendant testified that he told the victim he loved her and continued to hold her on the ground. He picked up the knife and said he was tired of her false accusations. Defendant testified that he took the knife and turned to leave when the victim ran at him, grabbed the blade of the knife and tried to turn it toward him. At that point, defendant backed away, and the victim told him he was going to jail. She went to pick up the phone and he grabbed it out of her hands and threw it down. Defendant testified that he left the victim's residence, stopped at a liquor store, and sat in a casino parking lot in Joliet. He was headed toward his mother's house in his motor vehicle when he was stopped by police and arrested.

Defendant testified that, prior to the incident, the victim found out about "Laurie" when she discovered a card from her. He testified that the victim continued asking him if he was seeing other women until he admitted to the affair. Defendant testified that the victim then "snapped" and threw a porcelain salt shaker at his face and hit him. Defendant further testified that they continued living together after this incident and the victim wrote him an apology.

On cross-examination, defendant admitted that at his first trial he did not testify that he attempted to cripple the victim's hands during the struggle or that she told him that she wanted a

gun. Defendant denied the stabbing and testified that the wounds must have occurred while they were wrestling or fighting. He testified that he did not observe any blood on her when he left the apartment. Defendant testified that he told Detective Rotkovich that when he left the apartment his wife was fine. Further, he said he did not know how the victim sustained her injuries. Defendant claims he did not call an ambulance or the police after the incident because he did not know the victim was badly injured.

Defendant was found guilty of attempted first degree murder and aggravated battery. Defendant's posttrial motion for a new trial and to reconsider his sentence was denied.

B. Sentence Hearings

On June 14, 2000, the trial court sentenced defendant to 60 years in the Illinois Department of Corrections. Before issuing sentence, the trial court stated that "this was as brutal and as vicious of a crime as this court has ever seen" and called defendant "dogged and relentless" describing him as "cruel", "cold blooded", "ruthless", and "genuinely evil." Defendant appealed his conviction and sentence claiming that (1) he was not proven guilty beyond a reasonable doubt, (2) his due process rights were violated due to a Brady violation (Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)), (3) the trial court determined the enhancing factors at sentencing and thus violated the extended term sentence guidelines in Apprendi, and (4) that the sentence was excessive. We rejected the first two claims, found Apprendi applicable and vacated the extended term sentence without reaching any other issue. The Illinois Supreme Court denied leave to appeal (205 Ill. 2d 596 (2003)) and the case was remanded to the trial court in November 2003.

Defendant's appointed counsel subsequently filed a Motion for Substitution of Judge for Cause, which alleged that the trial judge was prejudiced because he had already formed an opinion of defendant's guilt. Defendant, *pro se*, also filed a Motion for Substitution of Counsel. Both motions were denied.

On April 12, 2004, defendant told the trial judge that he no longer desired to be represented by the public defender's office. On April 16, 2004, the trial court resentenced defendant to 30 years in the Illinois Department of Corrections when he was not represented by counsel. Defendant again appealed, the State confessed error, and we vacated the 30 year sentence and remanded for a second resentencing hearing. We further found that no error was committed in the denial of defendant's Motion for Substitution of Judge.

Following remand, the public defender's office, was again appointed to represent defendant. On April 28 2006, defendant filed a *pro se* motion seeking to have his conviction overturned on double jeopardy grounds claiming that since the jury's convicted him of aggravated battery and was hung on the attempted murder charge, defendant was impliedly acquitted on the later charge and thus he was barred from being retried. The trial court denied the motion, noting that it had already been denied before the second trial.

Prior to the second re-sentencing hearing, defendant, *pro se*, requested the trial court to appoint a private attorney to represent him. In a supporting affidavit, defendant claimed that his second assistant public defender provided ineffective assistance and that his assistant public defender for the post conviction proceedings refused to assert the ineffectiveness claim. Defendant argued that attorneys with the Cook County Public Defender's Office did not assert

misconduct by other members of that office as a matter of public policy. His motion was heard and denied on June 29, 2006.

On July 19, 2006, after hearing only mitigation, the trial court again sentenced defendant to 30 years. After a posttrial motion for reconsideration was denied, defendant appealed. We affirmed that sentence.

C. Post Conviction Petition and Proceedings

During the pendency of his initial direct appeal, defendant, *pro se*, filed a post conviction petition on July 5, 2002 claiming that his bail was excessive and ineffective assistance of counsel, including a claim that defendant was prejudiced because his appellate and trial counsel "labored under a conflict of interest." On July 22, 2002, the trial court dismissed the petition as untimely. On July 25, 2002, defendant filed a motion to reconsider, however, the record is silent as to the disposition of that motion. Defendant appealed the trial court's initial dismissal. On April 24, 2003, the State confessed error as to the dismissal of defendant's initial post conviction petition, and on May 7, 2003, we granted leave to remand the matter to the trial court for further proceedings consistent with the Post Conviction Hearing Act, 725 ILCS 5/122-4 (West 2006).

Following remand, the public defender's office was appointed on June 13, 2003. Defendant, both by counsel and acting *pro se*, moved to have the trial judge disqualified for cause, and that motion was denied. On July 24, 2004, defendant filed a motion requesting the entry of an order directing the Public Defender's Office to "make the necessary amendments for adequate presentation of petitioner's contentions" or alternatively, "to direct the State to respond by motion to dismiss or answer." On July 22, 2005, defendant filed a first "supplemental" petition, a re-filed version of defendant's initial petition. During this time, defendant was

informed as to his options by his attorney concerning the assistance of counsel issue. In a letter, she told defendant that he could accept the public defender, retain private counsel, or proceed *pro se*. Defendant indicated that he wanted counsel but did not want an assistant public defender.

On April 28, 2006, during the third resentencing hearing, when defendant inquired about his post conviction counsel, the State interjected and the trial court responded and explained:

> "STATE: I do know there was a problem with admonishments as to representing yourself, and I would like to make sure that the record is very clear.
>
> THE COURT: What is the difference? No, no, this is the post conviction. He does not have a fundamental right to an attorney on a post conviction. So, if he choses [sic] to dismiss his post conviction lawyer, he goes on his own.
>
> DEFENDANT: All right, What is going on with the post conviction?
>
> THE COURT: Well, while you do have a right to counsel in a trial, such right does not exist in a post conviction. If you want the services of the Public Defender, I will appoint the – The Public Defender will continue to represent you. If you prefer not to have them, then it becomes your case, Mr. Bryant.
>
> * * *
>
> THE COURT: And on the appeal [from re-sentencing], if you wish an attorney, I will appoint one. The post conviction is running on a parallel track to the sentencing issue. That is a separate matter from the appeal… A post conviction is for matters that are not raised in the appeal. And that is not the

same rights as there is with an appeal. All right, do you understand that, Mr. Bryant?

DEFENDANT: No.

THE COURT: All right. You're not entitled to an attorney on a post conviction. If you reject the attorney you get, then you're on your own. Is that right Miss Meehen [Assistant State's Attorney]?

DEFENDANT: So, where am I supposed to get – if I reject the Public Defender, like you said.

THE COURT: Yes?

DEFENDANT: And you say, okay, you won't give me an attorney. It proceeded to the second stage and I was appointed an attorney. Now you're saying that I'm rejecting it. I'm not rejecting it."

On April 18, 2008, the trial court granted the Public Defender's Office leave to withdraw as counsel for defendant. Approximately six weeks prior to this date the public defender's office was again appointed and a new assistant public defender was representing defendant.

At the April 18 hearing defendant stated the following:

"…your Honor, because my petition was filed in 2002, it has been 6 – 2002. 3, 4, 5, 6, 7, 8. Six years since the time that I filed my petition. And there has been other attorneys that was on the case that left the case. And was transferred to other departments. At this point I'm going to not reject being represented by counsel. I need to be represented by counsel. But at the same token, I'm not going to be represented – I don't want to be represented by the Cook County

Public Defender. Please, You have already informed me and told me that you will not give me an attorney to represent me on post conviction because I'm not entitled to an attorney to be represented…I am not saying that I don't want to be represented. I'm not an attorney. But I'm going to refuse the representation of the Cook County Public Defender. And because there's no other option, as you said, I have only these two options, either go pro se or be represented by the Cook County Public Defender, I have no choice but to try and represent myself in these proceedings.

At that same hearing the trial judge and defendant had the following conversation:

"THE COURT: Are you going to represent your self Mr. Bryant?

DEFENDANT: Well, your Honor, like I said, I'm not rejecting representation. You've already told me you're not going to give me anybody other than the Cook County Public Defender.

THE COURT: Correct.

DEFENDANT: I have no choice. You don't give me any choice. So I have no choice but to represent myself."

On June 11, 2008, defendant, *pro se*, filed a second supplemental post conviction petition alleging that (1) there were various violations of defendants due process and equal protection rights due to ineffective assistance of counsel, (2) defendant was improperly retried for the offense of attempted first degree murder, (3) due to mistake of law, the jury verdict in his first trial was effectively impeached, (4) the trial court erred by failing to *sua sponte* instruct the jury "on the lesser included offenses by giving the jury an acquittal first instruction on the greater

offense charged," (5) defendant was entitled to a lesser included offense instruction, (6) defendant received ineffective assistance of trial counsel, and (7) defendant received ineffective assistance of appellate counsel for failure to raise ineffective assistance of trial counsel. Defendant also filed a motion requesting that trial court order the State to respond to defendant's post conviction petition for relief and no later then July 11, 2008. The State neither filed a motion to dismiss or an answer to defendant's petition.

On August 1, 2008, defendant sent a *pro se* letter to the presiding judge of the criminal division where he stated, "I have consistently maintained that the C.C. Pds have rendered me ineffective deficient representation at my second trial, on direct appeal and have continued to do so even on Post Conviction…the only thing that the C.C. Pd has done is contenuously [*sic*] ask[] for contenue [*sic*] after contenue [*sic*] to the point of excessive inordinate [*sic*] delay which has brought nothing but prejudice…"

At the final hearing on September 5, 2008, defendant represented himself. The trial court again asked defendant if he wanted the Public Defender's Office to represent him and the following conversations took place:

> "DEFENDANT: It's not my desire. I think I've told you this before.
>
> THE COURT: Oh, yes.
>
> DEFENDANT: It's not my desire to go pro se. I've told you a thousand times. I do not want to go pro se. *** As the record is clear, you allowed the public defender to withdraw. I asked for an attorney other than the Cook County Public Defender [to be] representing me.

> Continuously, every step of the way, I've told you, I don't want to represent myself, but I want an attorney that's going to come in here and represent me."

At this hearing, defendant asked the trial court to make a ruling stating, "I want a decision today. I want relief today. That's what I'm asking the Court, so that I can move forward on appeal." The Trial court asked the State for a response, and the State stated, "I don't even know what I'd be responding to, so no." The trial court then dismissed both petitioner's post conviction and supplemental post conviction petitions. The trial court stated that neither petition state a "meritorious claim for relief" and the petitions were denied. Defendant appeals.

ANALYSIS

On appeal, defendant claims that (1) the trial court erred by depriving defendant the right to counsel on his post conviction petition, and (2) the trial court erred in dismissing defendant's post conviction petitions *sua sponte.*

"The Post Conviction Hearing Act ("Act") provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." People v. Hodges, 234 Ill. 2d 1, 9 (2009); See 725 ILCS 5/122-1 *et seq* (West 2006). A post conviction proceeding not involving the death penalty contains three distinct stages. Hodges, 234 Ill. 2d at 10.

At the first stage, the trial court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether "the petition is frivolous or is patently without merit." Hodges, 234 Ill. 2d at 10. If the court

determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. Hodges, 234 Ill. 2d at 10; See 725 ILCS 5/122-2.1(a)(2) (West 2006). If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2006)), and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2006)). Hodges, 234 Ill. 2d at 10-11.

At the second stage, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. People v. Pendleton, 223 Ill. 2d 458, 472 (2006). If no such showing is made, the petition is dismissed. People v. Edwards, 197 Ill. 2d 239, 246 (2001). If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. Edwards, 197 Ill. 2d at 246; Pendleton, 223 Ill. 2d at 471; See 725 ILCS 5/122-6 (West 2006).

To proceed, pursuant to the Act, defendant files a petition in the trial court in which the original proceeding took place. Hodges, 234 Ill. 2d at 9. For the first stage, Section 122-2 of the Act requires that a post conviction petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." Hodges, 234 Ill. 2d at 9; See 725 ILCS 5/122-2 (West 2006). Defendant, at the first stage, need only present a limited amount of detail in the petition. Hodges, 234 Ill. 2d at 9. Since most petitions are drafted at this stage by defendants *pro se*, this court views the threshold for survival as low. Hodges, 234 Ill. 2d at 9. We only require that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. Hodges, 234 Ill. 2d at 9; See People v.

Porter, 122 Ill. 2d 64, 74, 521 N.E.2d 1158, 118 Ill. Dec. 465 (1988) (stating that only a "gist" of a constitutional claim is needed at this stage).

Throughout the second and third stages of a post conviction proceeding, the defendant has the burden of making a substantial showing of a constitutional violation. Pendleton, 223 Ill. 2d at 473 (2007). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard. Pendleton, 223 Ill. 2d at 473. When a petition is advanced to a third-stage, an evidentiary hearing is given, where fact-finding and credibility determinations are involved, and we will not reverse a circuit court's decision unless it is manifestly erroneous. Pendleton, 223 Ill. 2d at 473. If no such determinations are necessary at third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, we will apply a *de novo* standard of review, unless the judge presiding over post conviction proceedings has some "special expertise or familiarity" with the trial or sentencing of the defendant and that "familiarity" has some bearing upon disposition of the post conviction petition. Pendleton, 223 Ill. 2d at 473.

Right to Counsel

First, defendant claims that the trial court erred when it (1) forced defendant to proceed without the assistance of counsel, (2) repeatedly expressed its belief that post conviction litigants have no right to the assistance of counsel, and (3) neither obtained a knowing and voluntary waiver of counsel nor complied with any of the existing rules pertaining to warning *pro se* defendants of the consequences of such a waiver. Defendant asks this court to remand his case to the trial court with instructions to appoint defendant private counsel.

Defendant Was Given His Statutory Right to Appointed Counsel

First, defendant claims that he was forced to proceed without the assistance of counsel. The right to counsel in post conviction proceedings is not a constitutional but a statutory right arising only if the petition survives summary dismissal pursuant to 725 ILCS 5/122-2.1 (West 2006); People v. Kegel, 392 Ill. App. 538, 540 (2009). The statute states:

> "If the petition is not dismissed pursuant to Section 122-2.1 and alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner in accordance with Rule [651(c)] of the Supreme Court. 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 5/122-2.1 (West 2006).

In this case, the petition did survive Section 122-2.1 summary dismissal at the first stage and thus moved to the second stage. The trial court accordingly appointed counsel from the Public Defender's Office to represent defendant. Defendant objected that he wanted only private counsel. The trial court permitted the public defender to withdraw, advised defendant that he did not have the right to private counsel, and informed defendant that either he accept representation from the Public Defender's Office or represent himself *pro se*.

The statute clearly states that an indigent defendant "shall" be represented by appointed counsel and that defendant shall state "whether or not he wishes counsel to be appointed to represent him." 725 ILCS 5/122-4 (West 2006). The right to appointed counsel does not give defendant "the right to representation by counsel of defendant's choosing, or by counsel with whom the defendant has an amicable rapport." People v. Hardin, 217 Ill. 2d 289, 300 (2005). Defendant was thus properly granted his statutory right to counsel.

Defendant, requests that we remand with instructions to appoint defendant private counsel because defendant claims that appointment of the public defender's office prejudiced defendant from effectively raising his post conviction claims. However, defendant does not explain how an assistant defender's representation would have prejudiced him. The trial court has a statutory duty to appoint outside counsel, "…where the court finds that the rights of the defendant would be *prejudiced* by the appointment of the public defender…" 55 ILCS 5/3-4006 (emphasis added); see also 725 ILCS 113/3-3(b).

Defendant, in his appellate brief, claimed that he was deterred from effectively raising his claims of ineffective assistance of counsel because of a conflict of interest that existed among the several assistant public defenders that represented him. Defendant's right to post conviction counsel includes the correlative right to conflict free representation. Hardin, 217 Ill. 2d at 300. In People v. Smith, 37 Ill. 2d 622, 623-24 (1967), our Illinois Supreme Court found a *per se* conflict of interest existed when one public defender had to question the effectiveness of another public defender. Recently, our Illinois Supreme Court has held that "'it is not clear" that where an assistant public defender asserts the incompetency of another assistant, the reputation of the whole office is negatively impacted.'" Hardin, 217 Ill. 2d at 300; quoting People v. Banks, 121,

Ill. 2d 36, 43 (1987). Therefore, a mere bare accusation that a conflict exists between two public defenders will not force the trial court to perform a *sua sponte* investigation. It is the defendant that must show where the prejudice lays when it is not self-evident.

The pleading threshold for these claims is low. Hardin, 217 Ill. 2d at 303. When a defendant alleges that a potential and prejudicial conflict exists between two public defenders, defendant need only present the "gist" of such a conflict. Hardin, 217 Ill. 2d at 303. "The defendant must sketch, in limited detail, a picture of how the working relationship between the public defenders created an appearance of impropriety." Hardin, 217 Ill. 2d at 303. "Bare allegations of a conflict are not enough." Hardin, 217 Ill. 2d at 303. After a potential conflict of interest is properly brought to the trial court's attention, the trial court then "must take adequate steps *i.e.*, conduct 'a case-by-case inquiry'…to determine whether the risk of a conflict colored the defendant's representation." Hardin, 217 Ill. 2d at 302.

Even if the trial court was under the impression that defendant did not have a "fundamental right" to counsel for a second stage post conviction proceeding, the trial court did not err in denying defendant's request for the appointment of private counsel. According to Hardin, the trial court need not conduct a *sua sponte* inquiry where defendant has raised bare allegations of a conflict of interest among assistant public defenders without defendant showing how that conflict exists and how the defendant was prejudiced. Hardin, 217 Ill. 2d at 301.

In Hardin, defendant did not allege a conflict of interest in his *pro se* post conviction petition, rather defendant later drafted a letter to the trial court asking the trial court to appoint him private counsel stating that the assistant public defender assigned to defendant for post conviction proceedings failed to represent him properly, did not send copies of unnamed

documents, and did not keep defendant informed of the progress of the post conviction proceedings. Hardin, 217 Ill. 2d at 297. The trial court acknowledged that it received the letter, and the assistant public defender assured the trial court that defendant had received all documents and was informed of the proceedings. Hardin, 217 Ill. 2d at 297. The trial court dismissed defendant's post conviction petition without appointing private counsel, and we affirmed that decision, holding that defendant "failed to provide any details regarding [the] putative conflict of interest, other than the fact that his post conviction attorney worked in the same office as his trial attorney," (Hardin, 353 Ill. App. 3d 528). Hardin, 217 Ill. 2d at 304. The Illinois Supreme Court affirmed our ruling, concluding that the trial court was not responsible for "investigating a nebulous conflict of interest claim." Hardin, 217 Ill. 2d at 304.

In this case, defendant asserts that the "attorney-client relationship [had] broke[n] down," and "rather than ensure statutory compliance, [defendant] was forced to proceed pro se." However, defendant fails to show how the claimed conflict of interest prevented defendant from adequately being represented by the Public Defender's Office. Six weeks before the trial court allowed the Public Defender's Office to withdraw, a new assistant public defender was assigned to defendant's case. Between the time of this new assignment and the post conviction hearing, defendant did not claim that a "breakdown" in his relationship had occurred with this new assistant public defender. Defendant failed to assert before the trial court the reasons why he was displeased with his newly assigned assistant public defender, other than the fact that this assistant public defender shared the same office with his previously appointed counsel. Therefore, defendant's claims of conflict are nebulous and merely bare assertions that neither warrant a *sua sponte* inquiry nor appointment of private counsel.

Further, the State accurately claims in its brief that the only conflict of interest that defendant could legitimately raise at that time to show prejudice related to the ineffective assistance of appellate counsel. A post conviction proceeding is not an appeal from the judgment of a conviction, but a collateral attack on the trial court's proceedings. People v. Johnson, 191 Ill. 2d 257, 268 (2000). Issues that could have been raised on direct appeal but were not are forfeited. People v. Enis, 194 Ill. 2d 361, 375 (2000). In defendant's post conviction petition, he makes numerous claims of ineffective assistance of counsel. In all but the second trial and conviction, defendant was represented by the Office of the State Appellate Defender and not the Office of the Public Defender.

Accordingly, the only reasonable claims defendant could have used as justification for his allegations of prejudice were those surrounding his claims of ineffective assistance of appellate counsel. A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. Rogers, 197 Ill. 2d 216, 223 (2001). Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues, which, in his judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. People v. Simms, 192 Ill. 2d 348, 362 (2000). Thus the inquiry as to prejudice requires the reviewing court to examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. Simm, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. Rogers, 197 Ill. 2d at 223.

In this case, defendant was successful three out of four times on direct appeal, which could lead us to believe that defendant received adequate even outstanding representation, and that, if there were other claims that should have been raised, defendant's appellate counsel would have done so. Defendant does not show us what claims should have been raised that were not, thus we have no basis in which to find ineffective assistance of appellate counsel. Defendant furthermore does not sufficiently support his allegations that a conflict of interest existed between his assistant public defender and the Office of the State Appellate Defender, which would have prejudiced defendant from raising his post conviction claims of ineffective counsel. Therefore, defendant is not entitled to the appointment of private counsel.

Third, defendant claims that the trial court improperly permitted defendant's counsel to withdraw. Defendant relies on People v. McKenzie, to support his claim that nothing in the plain language of the statue permits the attorney, once appointed, to seek withdrawal or authorizes the court to grant such a request. 323 Ill. App. 592, 595 (2001); but see People v. Greer, 212 Ill. 2d 192 (2004) (attorney may withdraw if the claim raised by defendant lacks merit). The State persuasively argues in its brief that McKenzie did not envision a factual scenario where defendant dismisses his appointed counsel and where withdrawal logically follows.

In McKenzie, defendant was appointed counsel during a stage two post conviction hearing for a petition that raised a "possibly justiceable issue." 323 Ill. App. at 593. Defendant's counsel moved to withdraw, asserting that defendant's claims had no merit, and defendant did not object to the withdrawal. McKenzie, 323 Ill. App. at 593. The motion was granted and defendant was given time to amend his petition *pro se*. McKenzie, 323 Ill. App. at

593. Defendant moved for appointment of new counsel, but the trial court denied his request. McKenzie, 323 Ill. App. at 593. The State moved to dismiss the petition and the trial court granted the State's motion. McKenzie, 323 Ill. App. at 594. The Third District reversed the trial court's decision and instructed the lower court to appoint defendant new counsel. McKenzie, 323 Ill. App. at 596.

In this case, defendant refused the representation of an assistant public defender. He repeatedly voiced his objection to continued appointment from the Office of the Public Defender and eventually declined the assistance of appointed counsel. After the trial court directly interrogated defendant as to whether defendant desired counsel, defendant stated that he preferred to continue *pro se*. The trial court thus permitted defendant's appointed counsel to withdraw.

The statute states that, "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…" (Emphasis added.) 725 ILCS 5/122-4 (West 2006). Defendant clearly voiced his wish not to accept representation from appointed counsel offered by the trial court. Having determined that defendant was not prejudiced in such a manner to warrant appointment of private counsel, we find that the trial court did not err when it permitted defendant's appointed counsel to withdraw since defendant voiced his objection to having appointed counsel represent him.

B. Premature Dismissal of Postconviction Petition

Defendant next claims that the trial court erred in dismissing defendant's petition *sua sponte*. Defendant did not adequately support his post conviction claims to warrant his petition

to proceed into the third stage for an evidentiary hearing. To advance his case, defendant relies on a claimed procedural error of the trial court in failing to appoint private counsel and asks us to remand the case to the trial court for that purpose.

According to defendant's appellate brief, the defense writes, "it is impossible, from this record, to discern whether [the trial court] was treating this as a stage two matter or a stage three hearing" because there was neither a motion to dismiss required during a stage two proceeding and no evidentiary hearing, normally conducted during a stage three proceeding. Having viewed the record, we determine that the petition was still in the second stage of the post conviction process. The trial court had not yet made a ruling on whether the petition and accompanying documentation had made a showing of a constitutional violation. See Pendleton, 223 Ill. 2d at 472. Hodges, 234 Ill. 2d at 11.

Thus, the trial court was bound to follow Section 122-5 which states that:

> "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. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petiton or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just

and reasonable and as is generally provided in civil cases" (Emphasis added.)

725 ILCS 5/122-5 (West 2006).

The State is required to either file an answer or motion to dismiss during a stage two proceeding. In this case, the State did neither.

On September 5, 2008, defendant asked the trial court to make a ruling stating, "I want a decision today. I want relief today. That's what I'm asking the Court, so that I can move forward on appeal." The trial court asked the State for a response, and the State stated, "I don't even know what I'd be responding to, so no." The trial court then dismissed defendant's claim.

According to the Illinois Supreme Court, "a party cannot complain of error which he induced the court to make or which he consented." McMath v. Katholi, 191 Ill. 2d 251, 255 (2000); People v. Swope, 213 Ill. 2d 210, 217 (2004). Where the party invites or acquiesces to a procedural error, that party is estopped from claiming during appeal that the trial court erred. Swope, 213 Ill. 2d at 217.

In this case, defendant demanded an immediate decision. The trial court after consulting the State made a decision and dismissed the claim. Although a procedural error was committed when the State neither filed a motion to dismiss or answer, defendant demanded an immediate ruling and consequently received one. He therefore is estopped from relief.

Even if the defendant had not induced the court to make an immediate ruling on the issue, defendant was not prejudiced by the failure of the State to file an answer or motion to dismiss. If a motion to dismiss had been filed, the trial court would have justifiably made the same ruling. People v. Cortez, 338 Ill. App. 3d 122 (2003) is instructive to our decision to deny defendant relief. In Cortez, the State untimely filed a motion to dismiss and thus violated

Section 122-5. Defendant requested an evidentiary hearing due to the State's untimely filing. Cortez, 338 Ill. 3d at 124. We found that the dismissal of a post conviction claim should not have been reversed because of the State's untimely filing when a defendant fails to show that he was prejudiced by the delay caused by the State's untimeliness. Cortez, 338 Ill. App. 3d at 127.

Here, the State failed to file a motion to dismiss or answer, and although this was factually different from what occurred in Cortez, the ultimate result was the same, Section 122-5 was violated. Therefore, like in Cortez, defendant was required to show how the State's failure to file a motion to dismiss or answer prejudiced defendant from raising his claims in hopes of advancing his petition to a third stage evidentiary hearing. Defendant consequently argues in his reply brief that defendant was prejudiced because he did not have the benefit of amending his post conviction claims in response to the State's motion to dismiss or answer, but does not show how this prejudice occurred, or what he would have amended.

As earlier noted, defendant's ineffective assistance of counsel claims were either insufficiently supported or barred. Further, the remaining post conviction claims are not discussed in defendant's appellate brief and thus are forfeited. People v. Johnson, 385 Ill. App. 3d 585, 608 (2008) (a party waives a point by failing to argue it on appeal). We previously affirmed defendant's convictions resulting from his second trial and defendant is barred from again raising the same claims. See People v. English, 403 Ill. App. 3d 121, 129 (2010) (Any issues which were decided on direct appeal are barred by *res judicata;* any issues which could have been raised on direct appeal are forfeited). In this case, the post conviction claim failed to state any meritorious claims alleging cognizable constitutional violations and was thus properly dismissed.

CONCLUSION

We find that defendant is not entitled to the aid of appointed private counsel on bare allegations of a conflict of interest on a claim of ineffective assistance of counsel, and the trial court did not err when it dismissed defendant's post-conviction petition before the State filed an answer or motion to dismiss.

Affirmed.