No. 1-09-2239

FIFTH DIVISION
April 8, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 88 CR 8611
	)	
RANDY BANKS,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

HELD: Where defendant was admonished regarding waiver of counsel and proceeded *pro se*, and standby counsel was appointed after State indicated it would seek death penalty, appellate counsel was not ineffective in failing to raise absence of second set of admonitions as to waiver; the dismissal of defendant's post-conviction petition without an evidentiary hearing was affirmed.

Defendant Randy Banks appeals the circuit court's grant of the State's motion to dismiss his post-conviction petition,

contending his claim of ineffective assistance of appellate counsel warrants an evidentiary hearing. Defendant contends counsel on direct appeal should have argued defendant was not fully admonished as to the maximum sentence for his crime as required by Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). We affirm.

Following a jury trial in 1991 at which defendant represented himself, he was convicted of the first degree murder of Veronica Hurley, the 16-month-old child of his girlfriend. Before trial, defendant initially was represented by an assistant Cook County public defender. On August 5, 1988, defendant filed a motion with the trial court asking to act as his own attorney. The court questioned defendant and admonished defendant he could be sentenced to between 20 and 40 years in prison and up to 80 years in prison "if an extended term is possible." Defendant responded he understood and proceeded *pro se* for the next year.

On August 25, 1989, defendant appeared *pro se*, and the court asked if defendant had filed a response to the State's motion to introduce evidence of his other crimes. The court asked defendant if he wanted a public defender to be appointed to assist him and asked if defendant wanted to discuss the response with an attorney. Defendant replied: "Not to the extent that it would impinge upon my right to represent myself at trial, your Honor." The court appointed a public defender as standby counsel

"for the limited purpose of aiding [defendant] in filing this response."

On September 29, 1989, defendant appeared in court before a successor judge with a public defender, who told the court defendant was representing himself and wanted to prepare a response to the State's motion. Defendant complained to the court about inadequate law library access. The State responded that defendant was trying to delay his trial.

This exchange then occurred between the court and the State:

> "THE COURT: Is it correct that I see that the charge is murder, and is it correct that the State is asking for the death penalty in this case?
>
> MR. CERNIUS [Assistant State's Attorney]: Judge, this is a potential death case, yes.
>
> THE COURT: What['s] the punishment?
>
> MR. CERNIUS: Judge, that makes it request in this case, yes [*sic*].
>
> THE COURT: I'm not understanding what you [are] saying, Mr. Cernius. Will you be asking for the death penalty?

MR. CERNIUS: Judge, I am not sure if I have an obligation to inform everyone [of] that at this point.

THE COURT: Well, I want to be informed because I believe death penalty cases must be handled differently than other cases.

MR. CERNIUS: Well, Judge, at this time, I will then state to the Court that we will be seeking the death penalty in this case.

THE COURT: All right. With that in mind, I believe that it is appropriate for this Court to get an attorney from the Murder Task Force from the Public Defender's Office to assist Mr. Banks in preparing this motion."

The court told the assistant public defender acting as defendant's standby counsel that he wanted an attorney from the Murder Task Force to "be present on the next court date so that I can advise that attorney of what I wish him or her to do."

On October 6, 1989, defendant appeared in court represented by a public defender, who asked the court if he was being appointed to act as standby counsel. The court responded, "Well, I believe it would be a little bit more than standby counsel."

Defendant told the court he wanted to represent himself. The court responded to defendant as follows:

> "Mr. Banks, on the last court date, the State reaffirmed that they would be asking for the death penalty on this case. I think death penalty cases are of course the most serious type of cases that can be heard in a criminal court, sir. And the rules of evidence are even a little bit different than the rules that we apply to other cases.
>
> And the law is voluminous in this area. And the cases are coming down constantly from the United States Supreme Court and lawyers have difficulty following the cases as they come down from the Supreme Court. And, Mr. Banks, I don't think you have the ability to represent yourself on this type of case. And I am going to appoint the office of the Public Defender."

The court appointed the public defender who was present in court to represent defendant. When the public defender sought clarification of his role as full counsel as opposed to standby counsel, the court confirmed that ruling and further stated:

> "I believe that because the State is asking for the death penalty that society has a very great interest in making sure that there are no mistakes made. And again, I don't believe that Mr. Banks would have the ability to know all the law concerning the handling of death penalty cases and I believe that it is necessary for an attorney with experience in the area of handling death penalty cases to be involved in this case."

On the next court date of November 9, 1989, defendant and the assistant public defender appointed as his counsel appeared in court. Counsel told the court defendant wanted to represent himself and did not want to discuss his case with counsel. Defendant addressed the court and filed a written motion asking to proceed *pro se*. Defendant again complained of inadequate law library access when asked for a response to the State's motion regarding other-crimes evidence. The court continued the case for a week to allow defendant to respond to the State's motion.

Defendant's appointed counsel then addressed the court:

> "MR. HIRSHBOECK: Judge, at this point based on my conversation with Mr. Banks and his stated desire to proceed *pro se* and his stated desire not to speak about his case nor

> to cooperate with me, I'm asking leave of this Court at this time to withdraw from whatever role I've been appointed for at this point.
>
> THE COURT: At this juncture I'm going to ask that you remain as a standby counsel. I would ask that you periodically check with Mr. Banks. Make sure Mr. Banks has your phone number and has access to you.
>
> And, Mr. Banks, since you're preparing these motions and since I expect a response to the State's motion that is currently before the Court, I would suggest that you use the services of the Public Defender's Office so that this case can move forward. And it has been explained over and over again to you the seriousness of this offense and I'm sure you're aware of that. And I do want the case to move forward, so I'm going to continue it one week for us to get these other motions."

On November 16, 1989, defendant, accompanied by standby counsel, asked the court to "address the issue of whether I will be allowed to proceed *pro se*." The court requested defendant's

legal response to the State's motion. The court asked standby counsel if defendant requested his assistance, and counsel responded defendant did not want to discuss his case with counsel. Throughout the rest of the pre-trial proceedings, defendant proceeded *pro se* and continued to voice objection to the public defender's involvement in his case. The court continued to encourage defendant to avail himself of counsel's help.

Defendant's trial began in July 1991, and defendant acted as his own attorney, including at sentencing and in post-trial proceedings, with standby counsel present. The jury found defendant guilty of first degree murder and found defendant eligible for the death penalty based on the aggravating factor of the child's age and the existence of exceptionally brutal or heinous behavior indicative of wanton cruelty. The trial court sentenced defendant to death. On direct appeal to the Illinois Supreme Court, defendant was represented by the Office of the State Appellate Defender. Defendant's conviction and death sentence were affirmed. *People v. Banks*, 161 Ill. 2d 119, 148 (1994).[1]

In 1995, defendant, assisted by appointed counsel, filed a petition for relief under the Post-Conviction Hearing Act (the

[1]Defendant's death sentence was later commuted to life in prison without the possibility of parole.

Act) (725 ILCS 5/122-1 *et seq.* (West 1994)). Following several mental health evaluations and a hearing, the circuit court found in 2005 that defendant was unfit to assist counsel in post-conviction proceedings or proceed with his petition. In 2006, the court determined defendant had been restored to fitness.

In 2007, defendant filed a supplemental post-conviction petition raising three claims regarding the validity of his waiver of counsel. The petition alleged: (1) the trial court lacked a sufficient factual basis to determine whether the waiver was knowing and intelligent because the court relied on defendant's false statements that he had a college education and was a business owner; (2) defendant's waiver of counsel at the August 1988 hearing was based on the court's admonishment of a maximum sentence of 80 years, and when the State indicated it would seek the death penalty, the court was required to readmonish defendant and obtain another waiver of counsel; and (3) appellate counsel was ineffective in failing to raise on direct appeal the argument that the State's announcement regarding the death penalty required a second set of admonishments before defendant waived his right to counsel.

The State moved to dismiss the post-conviction petition, and defendant's appointed counsel filed a response. On July 16, 2009, some 20 years after the charged occurrence, the circuit

court, through yet another judge, granted the State's motion to dismiss defendant's petition.

On appeal, defendant contends this court should remand for an evidentiary hearing on his post-conviction claim of the ineffectiveness of his appellate counsel. He argues his appellate counsel was ineffective in failing to assert that he did not knowingly and intelligently waive his right to counsel after the State indicated it would seek the death penalty.

More precisely, defendant contends he did not knowingly and intelligently waive his right to counsel because the court's admonitions on August 5, 1988, did not reflect the maximum penalty to which he was subjected. In those admonitions, the court described a sentencing range of 20 to 80 years because the State had not yet announced it would seek the death penalty.

The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights, and to be entitled to post-conviction relief, a defendant must show he has suffered a substantial deprivation of those rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). An evidentiary hearing on a post-conviction petition is warranted only where the allegations of the petition, supported where appropriate by the trial record, make a substantial showing that a defendant's constitutional rights have been violated. *People v. Orange*, 195 Ill. 2d 437, 448 (2001).

The dismissal of a post-conviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

The State contends defendant's claim of inadequate admonitions under Rule 401(a) has been forfeited because defendant did not include it in his *pro se* motion for a new trial or in his motion for a new sentencing hearing and, moreover, the claim could have been raised in his direct appeal. However, defendant argued in his post-conviction petition that his appellate counsel was ineffective in failing to raise his claim on appeal. The doctrine of waiver does not bar review of an issue when the waiver arises from the ineffective assistance of appellate counsel. *People v. Moore*, 177 Ill. 2d 421, 428 (1997). Therefore, we consider the merits of defendant's contention.

Defendant contends he was not fully admonished under Rule 401(a) of his right to counsel to defend him against the maximum sentence of the death penalty. Defendant contends his initial waiver of counsel was based upon a maximum sentence of 80 years and that the court was required to readmonish him and obtain a second waiver of his right to counsel after the State announced it would seek the death penalty,

The sixth amendment to the United States Constitution (U.S. Const., amend. VI) guarantees an accused in a criminal proceeding the right to the assistance of counsel. *Faretta v. California*,

422 U.S. 806, 833-34 (1975). Notwithstanding that constitutional protection, a defendant may waive his right to counsel if the waiver is voluntary, knowing and intelligent. *People v. Hickey*, 204 Ill. 2d 585, 630 (2001); *People v. Haynes*, 174 Ill. 2d 204, 235 (1996).

A waiver of counsel occurs when a defendant informs the court he does not wish counsel and wants to stand alone. *People v. Smith*, 133 Ill. App. 3d 574, 580 (1985). A defendant's waiver must be clear and unequivocal. *People v. Mayo*, 198 Ill. 2d 530, 538 (2002). Before a defendant may waive his right to counsel, the court must address the defendant personally in open court, informing the defendant and ascertaining his understanding of the following principles: (1) the nature of the charge against him; (2) the minimum and maximum sentence prescribed by law; and (3) his right to counsel and to have counsel appointed for him by the court if he is indigent. Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Substantial compliance with Rule 401(a) will be sufficient to effectuate a valid waiver of counsel if the record indicates the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights. *Haynes*, 174 Ill. 2d at 236. The facts of each particular case are considered when weighing a defendant's claim of inadequate admonishments under Rule 401(a). *Haynes*, 174 Ill. 2d at 242.

The record indicates that on October 6, 1989, and again on November 9, 1989, defendant expressly stated he wanted to proceed *pro se*. Both of defendant's pronouncements were made after the State announced it would seek the death penalty. Defendant thereby waived his right to counsel after learning of the death penalty. Therefore, defendant was fully aware of the maximum penalty in this case and proceeded to trial while steadfastly refusing the aid of counsel. Defendant's decision to undergo trial without counsel with a possible death sentence as a result was knowingly and understandingly made.

Furthermore, after the State in this case announced it would pursue the death penalty, the court appointed standby counsel for defendant, albeit over his repeated and strenuous objections. Where standby counsel is appointed by the court, even if that appointment is made *sua sponte* and counsel was virtually silent during trial, a defendant cannot complain his waiver of counsel was invalid under Rule 401(a). *People v. Johnson*, 119 Ill. 2d 119, 136 (1987); *People v. Gibson*, 304 Ill. App. 3d 923, 928-29 (1999) (failure to properly admonish defendant under Rule 401(a) did not constitute prejudicial error in light of standby counsel, despite counsel's limited participation at trial); *People v. Eastland*, 257 Ill. App. 3d 394, 400 (1993) (defendant who is aware of nature of charge against him and who seeks to defend

himself "should not be heard to complain on appeal" of inadequate admonishments); *Smith*, 133 Ill. App. 3d at 581.

In arguing the court was required to give a second set of admonitions under Rule 401(a) after the death penalty announcement, defendant cites *People v. Cleveland*, 393 Ill. App. 3d 700 (2009), which discusses the "continuing waiver" rule. Defendant contends after the State decided to seek the death penalty, the court should have admonished him anew about his right to counsel before he rejected appointed counsel and resumed *pro se* status in November 1989.

In *Cleveland*, the defendant represented himself at trial after being admonished under Rule 401(a) and was found guilty. After trial, the defendant requested the assistance of counsel for the preparation and filing of post-trial motions and sentencing, and counsel was appointed. *Cleveland*, 393 Ill. App. 3d at 702. The defendant then asserted at the next court date that his appointed attorney would not follow his directions, and the trial court allowed the defendant to proceed *pro se* without a second set of Rule 401(a) admonitions. *Cleveland*, 393 Ill. App. 3d at 703.

In discussing the "continuing waiver" rule first set out in *People v. Baker*, 94 Ill. 2d 129, (1983), *Cleveland* noted a defendant's waiver of counsel remains in place unless: (1) the defendant requests counsel; or (2) other circumstances suggest

the waiver is limited to a particular stage of proceedings. *Cleveland*, 393 Ill. App. 3d at 705. The defendant's initial waiver ended when the defendant requested the assistance of counsel after trial, and the trial court was required to readmonish the defendant upon his second request to waive counsel. *Cleveland*, 393 Ill. App. 3d at 709.

The facts of *Cleveland* are plainly distinguishable because in that case, an exception to the defendant's continuing waiver was presented, *i.e.*, the defendant requested the appointment of counsel. Here, in contrast to *Cleveland*, defendant did not request counsel a second time and then proceed to decline the assistance of that counsel; rather, defendant in this case continually and pointedly opposed the appointment of counsel, even after the State's announcement of the death penalty.

In sum, defendant in this case chose to act *pro se* from the outset. The court admonished defendant regarding his waiver of counsel, and, after the State indicated it would seek the death penalty, the court appointed standby counsel for defendant after defendant continued to refuse counsel's assistance and insisted on proceeding as his own attorney.

An assertion of ineffective assistance of appellate counsel is analyzed under the same standard as a claim of the ineffectiveness of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). To establish the ineffective assistance of

counsel, a defendant must establish his attorney's representation fell below an objective standard of reasonableness and the performance caused prejudice to his case such that, without the error, the result of his trial would have been different. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984), adopting *Strickland v. Washington*, 466 U.S. 668 (1984). Because defendant was not prejudiced by appellate counsel's failure to raise the absence of a second set of Rule 401(a) admonishments, counsel did not provide ineffective assistance.

Accordingly, the circuit court's dismissal of defendant's petition without an evidentiary hearing is affirmed.

Affirmed.