2014 IL App (1st) 122937-U

No.1-12-2937

September 26, 2014

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD MCCORMICK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 05 CR 20067 The Honorable Arthur F. Hill Jr., Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in the second-stage dismissal of defendant's postconviction petition which alleged ineffective assistance of counsel due to counsel's alleged failure to file a motion to dismiss on statute-

of-limitations grounds, where defendant represented himself *pro se* for four months prior to trial, and where the record does not disclose a reasonable probability that, had defendant made such a motion at that time, the trial court would have found it untimely.

¶ 2 Defendant Donald McCormick was convicted after a jury trial of aggravated criminal sexual assault, aggravated kidnapping and robbery, and sentenced on April 2, 2009, to a total of 80 years in the Illinois Department of Corrections.

¶ 3 In this appeal, defendant contests the second-stage dismissal of his post-conviction petition. Defendant claims that his trial counsel and appellate counsel were both ineffective for failing to raise the claim that defendant was charged outside the applicable statute of limitations for both the robbery and aggravated kidnapping charges. The State moved to dismiss the petition on the ground that defendant represented himself *pro se* for several months prior to trial and during the trial itself, thereby waiving this claim. The trial court agreed, and dismissed on this basis.

¶ 4 This appeal raises the question of whether the *pro se* representation by a defendant during the months immediately preceding trial and during the trial itself waives a claim of ineffective assistance of counsel against a prior counsel for not previously challenging the indictment on statute of limitations grounds.

For the following reasons, we also agree with the State and the trial court, and affirm.

¶ 5 BACKGROUND

¶ 6 I. The Original Proceedings

¶ 7 On August 30, 2005, defendant was indicted for a sexual assault, robbery and kidnapping that had occurred almost four years earlier on September 28, 2001. The statute of limitations for robbery and kidnapping is generally three years (720 ILCS 5/3-5(b) (West 2004)). The indictment did not allege circumstances to extend or toll the statute of limitations. On this appeal, defendant does not challenge the timeliness of his indictment for sexual assault.

¶ 8 Since this appeal raises a very limited issue and since the underlying facts and evidence at trial were already described in our prior order on direct appeal, we see no need to repeat them here and instead provide only the facts relevant to our decision. *People v. McCormick*, No. 1-09-1143 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 As noted above, defendant was indicted on August 30, 2005; and the public defender was appointed to represent him at defendant's subsequent arraignment on October 3, 2005. The public defender represented defendant until September 12, 2008, when the trial court granted defendant's motion to proceed *pro se*. During these three years, the trial court ordered two separate

behavioral clinical examinations (BCXs) and the defense hired its own expert as well; none of the evaluations found defendant either insane at the time of the offense or unfit to stand trial.

¶ 10 On March 10, 2008, when defendant first requested in open court to proceed *pro se*, the trial court told defendant that he would be held to the same standards as an attorney and advised him against it. There was a short recess so defendant could consider his options and, when the parties returned on the record, the trial court asked "[s]o at this point you're withdrawing your request to go *pro se*" and defendant responded unequivocally: "Yes." Defendant thereby withdrew his motion.

¶ 11 On March 31, 2008, defense counsel requested a second fitness evaluation of "my client" because he had informed her that he was "hearing voices" when not on medication, and the trial court granted her request.

¶ 12 On September 12, 2008, defendant renewed his request in open court to proceed *pro se*, after the trial court had denied his request for what would have been a third fitness evaluation. The trial court reminded defendant that he faced possible life in prison and told him: "You don't get any break because you represent yourself." The court stressed: "There's an old adage. Only a fool has himself as an attorney." Defendant stated that he was dissatisfied with his counsel because the doctors were not asking the right questions during his

evaluations. Even after the court explained that the attorneys have nothing to do with the questions the doctors ask, defendant still wanted to proceed *pro se*, and the trial court granted his motion at this time.

¶ 13 On November 5, 2008, defendant requested the opportunity to talk to the assistant State's attorney (ASA) in order to work out a possible disposition, and the trial court admonished him about the dangers of speaking directly with the ASA. However, the trial court permitted the parties to use the jury room for this purpose on a future date, which occurred on November 13. On November 13, 2008, before defendant met with the ASA, the trial court reminded defendant that "[y]ou have to follow the same procedures as everyone else. I've gone through this with you on several occasions. You've always indicated you want to represent yourself, correct?" and defendant replied "yes." After meeting with the ASA, defendant again requested another fitness evaluation which the trial court denied, and defendant then stated: "I demand [a] speedy trial."

¶ 14 On December 15, defendant asked for a court order to receive shoes, which was granted, and the State indicated it was not ready, so the case was continued.

¶ 15 On January 12, 2009, on the morning before the jury trial was scheduled to begin, defendant asked the trial court if it would assign a different assistant

public defender to represent him. The trial court stated that, although it would not appoint a different attorney, it was willing to re-appoint defendant's prior counsel, even though this would mean a delay of a few weeks or a month and this would force the State to bring its witnesses back. However, after defendant's prior counsel was momentarily re-appointed, defendant changed his mind and stated: "Excuse me, your Honor, I will just defend myself." The trial court asked defendant if he wanted to represent himself, and he stated, "yeah, I'll represent myself."

¶ 16 The trial then began on January 12, 2009, and the evidence is described in our prior order. *McCormick*, No. 1-09-1143, slip op. at 7-8. The trial ended on January 15, 2009, with a verdict of guilty on all three counts: aggravated criminal sexual assault, aggravated kidnapping, and robbery.

¶ 17 As stated above, defendant received a total sentence of 80 years on April 2, 2009. Specifically, the mittimus states that defendant received (1) 40 years for count I, the sexual assault count; (2) 40 years for count XLIX,[1] the kidnapping count, which "shall run consecutive to" the sexual assault count, and (3) seven years for count LV, the robbery count. At sentencing, the trial judge stated that count LV, the robbery count, was to "be consecutive," but he did not

[1] Prior to the *voir dire* of the jury panel on January 12, 2009, the State nolle-prossed all the counts in the indictment save for the aggravated criminal sexual assault in count I, the aggravated kidnapping count in count XLIX, and the robbery count in count LV.

state whether it was to be consecutive to one or both of the other counts. However, the mittimus states "that Ct 49 extended term sentence. Ct 55 sentence to follow all other counts." In their briefs to this court, both the State and the defense agree that the sentence for count LV, the robbery count, is to run concurrently with count XLIX, the kidnapping count, which is also what this court stated when we affirmed his conviction and sentence on direct appeal. *McCormick*, No. 1-09-1143, slip op. at 1-2. Our Rule 23 order on direct appeal stated that defendant was "sentenced to an aggregate of eighty years in the Illinois Department of Corrections, which included a forty year term for aggravated criminal sexual assault consecutive to concurrent terms of forty years for aggravated kidnapping and seven years for robbery." *McCormick*, No. 1-09-1143, slip op. at 1-2.

¶ 18 On direct appeal, defendant claimed that he was denied counsel and that he did not make an understanding waiver of the right to counsel, because he was not adequately admonished by the trial court regarding that right. *McCormick*, No. 1-09-1143, slip op. at 2. For relief, he asked us to vacate his conviction and remand for a new trial. *McCormick*, No. 1-09-1143, slip op. at 2. On March 18, 2011, we held that the trial court ensured that defendant's waiver was made knowingly by giving defendant repeated and detailed warnings of the consequences of self-representation. *McCormick*, No. 1-09-

1143, slip op. at 2. We concluded that the trial court substantially complied with the requirement to admonish a defendant before accepting a waiver of counsel, and we affirmed. *McCormick*, No. 1-09-1143, slip op. at 2.

¶ 19 II. The Postconviction Proceedings

¶ 20 Five months after our decision on direct appeal, defendant filed a *pro se* postconviction petition on August 11, 2011, in which his first claim was "that he was convicted and sentence[d] for the offenses of aggravated kidnapping, and robbery beyond the statute of limitations period," thereby violating his right to due process. Defendant argued that, "pursuant to statute, the prosecution for the offenses of aggravated kidnapping and robbery were to be commenced within 3 years after the commission of the offense if it is a felony. See 720 ILCS 5/3-5(b)," and that "[t]he prosecution of the offenses w[as] barred by Section 3-5, because the offenses were alleged to have occurred on September 28, 2001 and the prosecution of the offenses w[as] not commenced until August 2005, which far exceed[ed] the 3 year limitations period." Defendant observed that "the charging instruments do not set forth any *** exceptions or requirements to toll or avoid the running of the statute."

¶ 21 Defendant argued that "[t]his Court may also address this claim under ineffective assistance of trial court because the Public Defender was appointed to represent him on October 3, 2005, and he was represented by several various

assistant public defenders up to November 13, 2008, when he proceeded *pro se*."

¶ 22 As we already noted above, defendant's request to proceed *pro se* was granted on September 12, 2008, not on November 13, 2008, as he asserts in his *pro se* petition.

¶ 23 Defendant then alleged that his appellate counsel was ineffective "due to the obviousness" of this issue. Defendant argued that "appellate counsel could have raised this obvious claim under ineffectiveness of trial counsel or Supreme Court Rule 615 which allows the presentment of plain errors or defects affecting substantial right ** although they were not brought to the attention of the trial court." The *pro se* petition also alleged that the trial court lacked subject and personal jurisdiction, that the grand jury did not timely return a true bill of indictment, and that he was denied his right to a preliminary hearing.

¶ 24 On September 22, 2011, the trial court ordered that:

> "(1) Defendant's *pro se* post conviction petition is docketed re: the issues surrounding [the] statute of limitations and incompetency of appellate counsel;
>
> (2) Office of the Public Defender is appointed to represent defendant."

¶ 25 On April 3, 2012, an assistant public defender (APD) filed an amended postconviction petition, in which she acknowledged the other claims made by defendant in his *pro se* petition but she argued only the statute-of-limitations claim. In the amended petition, she alleged, as did defendant, that the prosecution for the kidnapping and robbery charges was brought beyond the three-year statute of limitations; that the State had failed to plead any extension or tolling of the limitations period; that both pretrial counsel and appellate counsel were ineffective; and that the court could consider counsel's errors under the plain error doctrine.

¶ 26 On July 2, 2012, the State moved to dismiss. In its motion, the State acknowledged that the indictment was "a defective charging document," but argued that for "ten months the petitioner acted as his own attorney, prior to trial," and thus, he "had the opportunity to file a pretrial motion to dismiss but did not do so," thereby waiving the limitations issue, since "he was the person directly responsible for the failure to file the pretrial motion to dismiss." The State offered no arguments that the kidnapping and robbery charges were within any statute of limitations, extensions or tolling periods.

¶ 27 The State's motion raised only two grounds: (1) waiver; and (2) no ineffectiveness of counsel. First, the State argued that the limitations issue was waived, because the issue was evident from the record and should have been

raised on direct appeal, and because defendant failed to file the written pretrial motion necessary to preserve the issue. Second, the State argued that appellate and trial counsel were not ineffective because, when a defendant challenges the sufficiency of an indictment for the first time on appeal, it will be deemed sufficient if it apprises defendant of the charges, and because defendant represented himself for 10 months prior to trial and could have filed the motion during that time.

¶ 28 The record establishes that the "ten months" statement is incorrect. Defendant represented himself for 4 months prior to trial, not 10. Trial began on January 13, 2009; and 10 months before the start of the trial would have been approximately the court appearance on March 10, 2008, when defendant first requested to proceed *pro se*. However, defendant withdrew that request at the end of the March 10, 2008, proceeding and did not renew it again until September 12, 2008, which was four months before trial, and the trial court granted it then. All of these facts were already stated in our order on direct appeal. *McCormick*, No. 1-09-1143, slip op. at 1-2.

¶ 29 At the second-stage hearing on the State's motion to dismiss, the State acknowledged that, although the aggravated sexual assault was within the statute of limitations for that offense, "the aggravated kidnapping and the robbery [are] not the same situation." At the hearing, the State did not claim

that the kidnapping and robbery were within the statue of limitations, but instead argued solely that, since defendant failed to file the required pretrial motion to preserve this issue for review, any statute-of-limitations issue was waived. The State argued that a claim of ineffectivenss of trial counsel would not help defendant circumvent waiver, because defendant "was his own attorney for about 10 months" and, thus, the public defenders "are immune from any kind of ineffective[ness] claim because they can file that motion at any time prior to trial. It's a matter of strategy. They might have thought maybe we will wait until later in the game."

¶ 30 In response, the defense argued at the hearing that "under the plain error review a Court can review a procedural default of trial error, and Mr. McCormick is resting on that doctrine." The defense argued that "the Court does have discretion just on mercy and fundamental fairness because he in effect has a life sentence." The defense summed up by saying: "really the only legal issue is whether the Court under the facts presented in this case would want to exercise judicial discretion based on fundamental fairness."

¶ 31 After ascertaining that neither side had anything more to add, the trial court issued the following ruling:

"THE COURT: All right. I agree with the State in this situation. The defendant, at least for those last ten months prior to the jury trial,

represented himself. He took on the burden and responsibilities here. He did not protect himself. He put himself in a situation, and these are the consequences of it.

Consistent with the case law and I think based on the totality of the circumstances, I am going to grant the State's motion to dismiss."

The trial court, who was not the judge during the original proceedings, thus repeated the State's incorrect factual statement that defendant had represented himself "at least for those last ten months prior to trial."

¶ 32 Defendant filed a timely notice of appeal, and this appeal followed.

¶ 33 ANALYSIS

¶ 34 On this appeal of the second-stage dismissal of defendant's postconviction petition, defendant raises two separate and distinct claims: (1) that his pretrial counsel was ineffective for failing to make a motion raising the limitations issue before trial; and (2) that his appellate counsel was ineffective for failing to raise the limitations issue on direct appeal. For the following reasons, we do not find either claim persuasive.

¶ 35 I. Stages of a Postconviction Petition

¶ 36 Under the Post-Conviction Hearing Act (Act), individuals convicted of a criminal offense may challenge their convictions if there was a violation of their constitutional rights (725 ILCS 5/122-1 *et seq*. (West 2012)). See also *People v.*

Domagala, 2013 IL 113688, ¶ 32. The Act provides for three stages of review by the trial court. At the first stage, the trial court may summarily dismiss a petition that is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 37 If the trial court does not dismiss a petition at the first stage, the petition advances to the second stage, where counsel is appointed if a defendant is indigent. After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2012); *Domagala*, 2013 IL 113688, ¶ 33. At the second stage, the trial court must determine whether the petition and any accompanying documents make a "substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 38 If the defendant makes this showing at the second stage, then the petition advances to a third-stage evidentiary hearing. At a third-stage evidentiary hearing, the trial court acts as factfinder, determining witness credibility and the weight to be given particular testimony and evidence, and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 39 II. Standard of Review

¶ 40 In this case, the trial court dismissed defendant's postconviction petition at the second stage. During a second-stage dismissal hearing, the defendant

bears the burden of making a substantial showing of a constitutional violation. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 41 At this stage, the trial court accepts as true all well-pled facts that are not positively rebutted by the record. *Domagala*, 2013 IL 113688, ¶ 35 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). There is no fact finding or credibility determination at this stage. *Domagala*, 2013 IL 113688, ¶ 35 (citing *Coleman*, 183 Ill. 2d at 385). As a result, the State's motion to dismiss raises solely the issue of whether the petition is sufficient as a matter of law. *Domagala*, 2013 IL 113688, ¶ 35 (citing *Coleman*, 183 Ill. 2d at 385). The question before the court is whether the petition's well-pled allegations, if proven, would entitle the defendant to relief. *Domagala*, 2013 IL 113688, ¶ 35. Since this is a purely legal question, our review at the second stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998). *De novo* consideration in the case at bar means that we perform the same analysis that the trial judge would have performed, if we had been sitting during the second-stage dismissal hearing. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 42 III. *Strickland* and Ineffectiveness of Counsel

¶ 43 On this appeal, defendant claims that both his pretrial counsel and his appellate counsel were ineffective.

¶ 44 Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and the Illinois State Constitution. U.S. Const., amends., VI, XIV; Ill. Const. 1970, art. I., § 8; *Domagala*, 2013 IL 113688, ¶ 36. Claims of ineffective assistance are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland* for Illinois)). To prevail on a claim of ineffective assistance, a defendant must show both: (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 45 To establish the first prong, that counsel's performance was deficient, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36. To establish the second prong, that this deficient performance prejudiced the defendant, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome – or put another

way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 46 Although the *Strickland* test is a two-prong test, our analysis may proceed in any order. Since a defendant must satisfy both prongs of the *Strickland* test in order to prevail, a trial court may dismiss the claim if either prong is missing. *People v. Flores*, 153 Ill. 2d 264, 283 (1992). Thus, if a court finds that defendant was not prejudiced by the alleged error, it may dismiss on that basis alone without further analysis. *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 47 IV. Pretrial Counsel

¶ 48 Defendant claims that his pretrial counsel was ineffective for failing to present a motion to dismiss the robbery and kidnapping charges against him on statute-of-limitations grounds.

¶ 49 In order to preserve a claim that a prosecution violates the statute of limitations, a defendant must make a motion both in writing and before trial; otherwise, the issue is waived. 725 ILCS 5/114-1(a) (West 2004) (requiring "a written motion *** before trial" for certain issues), 114-(a)(2) (listing as one of the issues a prosecution "barred" by section 3-5 through 3-8 of the Criminal Code of 1961 [720 ILCS 5/3-5 to 5/3-8 (West 2004)] which provides for a

statute of limitations) and 114-1(b) (stating that the issue is "waived"); *People v. Gwinn*, 255 Ill. App. 3d 628, 631 (1994) ("If a defendant wishes to raise the statute of limitations as a bar to prosecution, he must file a written motion to dismiss before trial"); *People v. Cooksey*, 309 Ill. App. 3d 839, 843-44 (1999) (same re: speedy trial act claims).

¶ 50 No motion was made in the case at all, either orally or in writing, so the issue was waived. *Gwinn*, 255 Ill. App. 3d at 631 (by failing to file a motion "at any point during the proceedings in the trial court," the defendant "waived the statute of limitations argument on appeal"); *Cooksey*, 309 Ill. App. 3d at 843 (by failing to file "an oral or witten motion prior to trial seeking discharge or dismissal based upon a speedy-trial violation," the defendant "failed to properly preserve this issue for our reivew").

¶ 51 Typically, in cases where no limitations motion was made, the defendant then asserts that his pretrial counsel was ineffective, as defendant does here. *E.g.*, *Gwinn*, 255 Ill. App. 3d at 631-32 (reversed and remanded on ground that pretrial counsel rendered ineffective assistance by failing to file a motion raising the statute-of-limitations issue); *Cooksey*, 309 Ill. App. 3d at 843-44. However, there is a wrinkle in this case which makes it unusual, namely, that defendant fired his counsel, the public defender, four months before trial.

¶ 52 The parties have not cited for us, nor have we found, a single case where a defendant fires his counsel months before trial and then later claims that his earlier counsel was ineffective for failing to file a limitations motion. Since the requirement for filing a motion has been on the Illinois statute books for decades, the lack of a case suggests that this situation arises rarely.

¶ 53 Although defendant does not cite a case presenting this particular situation, he does offer an argument based on the language of the statute itself. The statute requires the defense to make a limitations motion "within a reasonable time" after arraignment. 725 ILCS 5/114-1(b) (West 2004). If the defense does not make a motion "within such time" or within "an extension" granted by the trial court, the issue is "waived." 725 ILCS 5/114-1(b) (West 2004). Based on this statutory language, defendant argues that, by the time he was representing himself, the trial court would have found that any limitations motion he made was no longer "reasonable" and thus the issue had already been "waived" by his prior counsel by the time he was representing himself. See 725 ILCS 5/114-1(b) (West 2004).

¶ 54 Under the particular circumstances of this case, we find this scenario unlikely. The statute provides no specific time limits for the motion, and no hard-and-fast rules to cabin the trial court's discretion as to what is "reasonable" in the particular case before it. 725 ILCS 5/114-1(b) (West 2004). The statute

even permits the trial court to grant an "extension," and the statute does not set forth any limits on the trial court's discretion to grant this extension. 725 ILCS 5/114-1(b) (West 2004). There is no list of circumstances or factors for the trial court to consider before granting an extension. 725 ILCS 5/114-1(b) (West 2004).

¶ 55 Research of this particular section in the Illinois Compiled Statutes does not reveal many published cases that have cited it, and none are particularly helpful here. For example, in *People v. Wigman*, 2012 IL App (2d) 100736, ¶ 28, the appellate court did not consider the meaning of the word "reasonable," because it found no motion was filed. In *People v. Levan*, 285 Ill. App. 3d 347, 348, 350 (1996), the State asked the appellate court to conclude that defendant's double-jeopardy motion was not filed "within a reasonable time" after arraignment, when defendant was arraigned on March 22, 1995, and defendant filed the motion on July 13, 1995. However, the appellate court declined to consider the argument because "[e]ven if the motion was untimely, the defendant would still be entitled to a reversal because of ineffective assistance of counsel." *Levan*, 285 Ill. App. 3d at 350. Thus, none of these cases considered the exercise of the trial court's discretion in allowing a motion to go forward. See also *People v. Ventsias*, 2014 IL App (3d) 130275, ¶ 6 n.4 (appellate court cited this subsection but merely to observe that no issue was

raised "as to whether the motion to dismiss was timely filed" pursuant to it); *Cooksey*, 309 Ill. App. 3d at 843-44 (no motion at all was filed, and the appellate court decided the issue on ineffectiveness grounds); *People v. Adams*, 161 Ill. 2d 333, 341 (1994) (although the subsection was cited, no motion at all was filed and the case concerned a venue issue).

¶ 56 However, another case, which discusses an earlier version of the section in the Illinois Revised Statutes, is more helpful. *People v. Covelli*, 184 Ill. App. 3d 114, 119 (1989) (discussing Ill. Rev. Stat. 1987, ch. 38, ¶ 114-(b), which provided that "the court shall require any motion to dismiss to be filed within a reasonable time after the defendant has been arraigned" or the issue is waived). In *Covelli*, the State argued before both the trial court and the appellate court that the defendant's motion to dismiss was untimely because the defendant was arraigned on December 3, 1985, and his motions to dismiss were not filed until more than one year later on December 18, 1986. *Covelli*, 184 Ill. App. 3d at 119. The appellate court held: "What constitutes a 'reasonable time' necessarily falls within the discretion of the trial court. It is axiomatic in such instances that the trial court's decision will not be reversed on review unless it constitutes an abuse of discretion." *Covelli*, 184 Ill. App. 3d at 120. Rejecting the State's argument, the appellate court concluded that "subsection 114-1(b) of the Code clearly affords the trial court discretion to extend the time for filing, and it did

so here." *Covelli*, 184 Ill. App. 3d at 119. Thus, the *Covelli* case supports our conclusion that the trial court enjoys great discretion in deciding whether a motion was "reasonable" when filed. See also *People v. Dimond*, 54 Ill. App. 3d 439, 442 (1977) (the appellate court could not find that the trial court abused its discretion by denying the defendant's motion as untimely where no prejudice resulted).

¶ 57 In the case at bar, the trial court was willing to delay the trial, on the very morning of trial, and force the State to come back a month later with its witnesses, in order to give defendant yet another opportunity to proceed with counsel. It is hard to believe that, in this particular case, after permitting defendant to represent himself, the trial court would then deny a limitations motion by defendant as untimely or refuse him an extension to file it.

¶ 58 Although the postconviction trial court mistakenly stated that defendant's representation lasted 10 months instead of the actual 4, the reasoning remains the same. This is particularly true when both defendant and the prior counsel may have had strategic reasons for not yet moving to dismiss less serious charges where the record discloses that plea negotiations were taking place as late as two months prior to trial. See *Gwinn*, 255 Ill. App. 3d at 632 ("there may be situations where defense counsel's decision not to file a motion to dismiss

could be considered a matter involving the exercise of judgment, discretion, or trial tactics").

¶ 59 Since it is reasonably probable that defendant still could have presented his motion when he assumed representation of his case *pro se*, he did not suffer prejudice from his counsel's prior failure to present it. For example, in a civil malpractice case, if a subsequent attorney fails to rectify a prior attorney's alleged negligence, then the second attorney's failure is an intervening cause which breaks the chain of proximate cause, so long as the second attorney had sufficient time and opportunity to act. *Mitchell v. Schwain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 621 (2002) (Theis, J.) See also *Land v. Greenwood*, 133 Ill. App. 3d 537, 539-41 (1985) (there was no proximate cause, although the first attorney failed to serve several defendants with process, where the second attorney waited four to five months after being retained to serve the defendants and the trial court dismissed the case for lack of due diligence (discussed in *Mitchell*, 332 Ill. App. 3d at 620-21)).

¶ 60 To establish the prejudice prong of the *Strickland* test, defendant must show that there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). Since

defendant's claim does not pass this "but for" test, he cannot establish the prejudice prong of the *Strickland* test.

¶ 61 As we observed above, although the *Strickland* test is a two-prong test, our analysis may proceed in any order. Since a defendant must satisfy both prongs of the *Strickland* test in order to prevail, a court may dismiss the claim if either prong is missing, and such is the case here. See *People v. Flores*, 153 Ill. 2d 264, 283 (1992). Thus, since we agree with the trial court that defendant was not prejudiced, we may affirm on that basis alone without further analysis. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 62 Because we affirm the trial court on the ground relied on by the trial court, we do not consider other arguments put forth by the parties on appeal which were not argued by them at the second-stage hearing before the trial court. *City of Chicago v. Jeron*, 2014 IL App (1st) 131377, ¶ 4 (matters not argued in the court below are waived on appeal); *St. Paul Mercury Insurance v. Aargus Security Systems, Inc.*, 2013 IL App (1st) 120784, ¶ 51 (" 'matters not presented to or ruled upon by the trial court may not be raised for the first time on appeal' " (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986))). In addition, defendant cites *People v. Meier*, 223 Ill. App. 3d 490 (1992), and *People v. Stivers*, 338 Ill. App. 3d 262 (2003), *overruled on other grounds by*

People v. Blair, 215 Ill. 2d 427, 441-42 (2005), for the proposition that pretrial counsel would have succeeded if she had raised the limitations claim. However, these cases relate to the deficient performance prong and, since we base our decision on the prejudice prong, this proposition is not relevant to our decision.

¶ 63 V. Appellate Counsel

¶ 64 On this postconviction appeal, defendant claims that, not only was his trial counsel ineffective, but so was his counsel on direct appeal.

¶ 65 Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show: (1) that appellate counsel's failure to raise an issue on direct appeal was objectively unreasonable and (2) that the decision prejudiced defendant. *Childress*, 191 Ill. 2d at 175. Unless the underlying issue is meritorious, a defendant suffered no prejudice from counsel's failure to raise it on direct appeal. *Childress*, 191 Ill. 2d at 175. Thus, the first step in determining whether appellate counsel was infective is usually to determine whether a defendant's underlying claim of ineffectivenss of trial counsel would have succeeded if raised on direct appeal. *Childress*, 191 Ill. 2d at 175. Normally, if a defendant's claim of ineffective

assistance of trial counsel is meritless, so then also is the claim against appellate counsel. *Childress*, 191 Ill. 2d at 175.

¶ 66 On this postconviction appeal, defendant claims that counsel on direct appeal was ineffective for two independent reasons: (1) that appellate counsel failed to raise the ineffectiveness of defendant's pretrial counsel; and (2) that appellate counsel failed to raise a "freestanding claim, independent of [pretrial] counsel's representation," which was that the State failed to allege in the indictment the basis upon which it sought to extend the limitations period.

¶ 67 We do not find defendant's first claim persuasive because, as we already discussed above, defendant could not assert the ineffectiveness of pretrial counsel and, thus, appellate counsel was not ineffective for failing to raise it. *Childress*, 191 Ill. 2d at 175. As for defendant's second claim, we are not persuaded that there existed a freestanding claim for appellate counsel to raise.

¶ 68 For defendant's second claim regarding appellate counsel, defendant relies exclusively on *dicta* in one case: *Meier*, 223 Ill. App. 3d at 492. In *Meier*, 223 Ill. App. 3d at 491-92, the Fifth District concluded, first, that the information before it was defective, because it failed to allege the grounds upon which the limitations period could be extended, and an extension must be stated in the indictment or information. Next, it addressed the State's waiver argument which was based on the fact that the defendant failed to file a pretrial motion

raising the limitations issue. *Meier*, 223 Ill. App. 3d at 492. The appellate court acknowledged the defendant's waiver, but stated that it "declined to apply the general waiver rule in this instance," thereby limiting its holding to the particular facts before it. *Meier*, 223 Ill. App. 3d at 492 (repeating the phrase "in this instance" twice, for emphasis). In reaching the decision not to apply the waiver rule "in this instance," the appellate court relied, first, on the fact that pretrial counsel was ineffective. *Meier*, 223 Ill. App. 3d at 492. As we already concluded above, in the case at bar, defendant cannot assert a claim for ineffectiveness of pretrial counsel. After discussing pretrial counsel's ineffectiveness, the *Meier* court added, "[m]oreover," an information or indictment which fails to allege an extension or toll of the limitations period is "vulnerable to attack at any time, including on appeal." *Meier*, 223 Ill. App. 3d at 492. We do not find this *dicta* persuasive, when pretrial counsel's ineffectiveness alone was sufficient for reversal.

¶ 69 In addition, defendant does not cite any case besides *Meier* for this point. Only four cases have cited *Meier* in the 20 years since it was decided; and one rejected it. *People v. Gray*, 396 Ill. App. 3d 216, 226 (2009) (only "if" the defendant first challenges the timeliness of the charges in a pretrial motion to dismiss, does the State *then* have the burden of pleading and proving any extension or toll of the limitations period). A second case was written by a

member of the *Meier* panel who cited it only with respect to ineffectiveness of counsel, as opposed to the point for which defendant now cites it. *People v. Diestelhorst*, 344 Ill. App. 3d 1172, 1188 (2003). Similarly, a third case cited it only for ineffectiveness of counsel (*Gwinn*, 255 Ill. App. 3d at 632), and rejected the holding that defendant now cites it for. *Gwinn*, 255 Ill. App. 3d at 631 (where an information is defective because the State failed to plead an exception to the statute of limitation but the defendant raised this claim for the first time on appeal, the information is still sufficient if "it specifically described the offense charged and the conduct giving rise to the State's prosecution"). In a fourth case, the appellate court found that waiver did not apply because the language used in the defendant's pretrial motion was sufficient to raise the issue; by contrast, in the case at bar, no motion was ever made. *People v. Coleman*, 245 Ill. App. 3d 592, 594 (1993). In sum, the few cases citing *Meier* do not persuade us to follow it on this point.

¶ 70 Thus, defendant's appellate counsel was not ineffective because, first, since defendant cannot claim the ineffectiveness of trial counsel, appellate counsel was not ineffective for failing to raise it; and, second, there was no

¶ 71 freestanding claim for appellate counsel to raise.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, we do not find persuasive defendant's claims that his trial and appellate counsel were ineffective.

¶ 74 Affirmed.