2019 IL App (1st) 161667-U

SIXTH DIVISION
FEBRUARY 8, 2019

No. 1-16-1667

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. 09 CR 10895
	)	
RICHARD MILLER,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of defendant's postconviction petition was proper, as it did not present an arguable claim that counsel on direct appeal rendered ineffective assistance of counsel by failing to argue that the circuit court erred in denying defendant's request to continue the trial date.

¶ 2 Defendant-appellant Richard Miller (defendant) appeals from the first-stage dismissal of his postconviction petition, which asserted that his counsel on direct appeal was ineffective for failing to argue that the trial court erred in denying his request to continue his trial date. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In June 2009, a grand jury indicted defendant on two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. The charges were predicated on alleged acts committed in 2008 against M.B., the minor daughter of defendant's former girlfriend.

¶ 5 The public defender was appointed to represent the defendant. In June 2010, defendant moved to quash his arrest. The trial court conducted a hearing on that motion in September and October 2010. On October 29, 2010, the trial court denied the motion.

¶ 6 In December 2010, defendant moved to suppress incriminating statements he made to detectives and to an Assistant State's Attorney. Also in December 2010, the State moved pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2010)) to admit evidence of statements by M.B. to her mother and to a social worker, in which M.B. had described defendant's sexual acts with her.

¶ 7 In February and March 2011, the court heard witness testimony regarding the motion to suppress and the section 115-10 motion. On March 24, 2011, the court denied defendant's motion to suppress statements. On the same date, the court granted the section 115-10 motion in part, admitting M.B.'s statements to the social worker but declining to admit M.B.'s statements to her mother describing the alleged acts.

¶ 8 On April 21, 2011, the trial court denied defendant's motion to reconsider its ruling on the section 115-10 motion. On that date, counsel for both parties indicated they would be ready to try the case on July 25, 2011.

¶ 9 On June 13, at the request of the State's attorney, the trial date was rescheduled for September 19. At a status hearing on August 3, 2011, the parties indicated they were ready to

proceed to trial on September 19, 2011. At that time defendant was represented by public defender Timothy O'Hara. O'Hara noted that defendant had requested transcripts from the section 115-10 motion and the motion to suppress; the court stated that this would be "fine."

¶ 10 On September 19, 2011, another attorney from the public defender's office, Milton Travis, informed the court that O'Hara had left the public defender's office, and that another public defender, Robyn Haynes, would serve as defendant's trial counsel.

¶ 11 On October 5, 2011, Haynes first appeared on behalf of defendant and communicated to the court that defendant "indicated that the Court has already granted permission to give him copies of all of the motion transcripts." Defendant told the court that he wanted transcripts from the section 115-10 motion and "the motion to suppress evidence and squash arrest." The court declined to order the public defender to provide those transcripts to defendant.

¶ 12 The case was continued to December 15, 2011. On that date, public defender Kevin Ochalla informed the court that he and Haynes were "still in the process of reviewing the case" and requested another continuance.

¶ 13 At a March 1, 2012 hearing, public defender Ochalla told the court that defense counsel was discussing an April 9 jury trial with the State's Attorney. At a March 22, 2012 hearing, Ochalla informed the court that he would be "taking over this case" from Haynes, and thus he would not be prepared to begin trial on April 9.

¶ 14 At hearings in May 2012, defense counsel told the court that he and the State's Attorney were "attempting to resolve this matter short of trial." On June 13, 2012, defense counsel and the State's attorney told the court they would be ready for a jury trial on August 20, if the matter could not be resolved.

¶ 15 On July 31, 2012, the State and the public defender informed the court that defendant had not yet responded to a plea offer. The parties indicated they would otherwise be prepared for trial on September 17, 2012. On August 16, 2012, the parties again indicated that they were prepared to proceed to trial on September 17.

¶ 16 At a hearing on August 30, defendant informed the court, for the first time, that he "would like to waive [his] Sixth Amendment right to counsel pursuant to Supreme Court Rule 401." The following exchange ensued:

> "THE COURT: You want to waive your right to counsel?
>
> DEFENDANT: Yes.
>
> THE COURT: Are you ready to proceed to trial on September 17th on your own?
>
> DEFENDANT: No. And I'm asking full admonishment for six hours a week for law library.
>
> THE COURT: Mr. Miller, the case is going to go to trial September 17th. This is a '09 case. You have two other cases on the call as well. They've all been pending for a considerable period of time. An enormous amount of work has been put in on your side and on the State's side to have the matter ready for trial on September 17th. You had always wanted to [sic] trial. You've been asking for a trial, you're finally getting it.
>
> DEFENDANT: I'm not ready for a trial.

THE COURT: Now you're changing your mind because now everybody says they're ready to go and you've decided that somehow you think you can delay it.

DEFENDANT: I'm not trying to delay it. I told him already I wasn't ready for trial.

THE COURT: Well, you have to be ready on September 17th. I'm not going to delay the case. I've set that week aside for your case. I have been hearing motions on your case that have taken an extraordinarily long time to get it to this point. It's been on my call for a couple years. It was on other judges' calls before that. For some reason, I can't recall at this time, it was transferred. It's been pending in the felony trial court since June 30th of 09.

You've never indicated that you wanted to represent yourself prior to this point in time. If you want to represent yourself, there is a chance that I'll let you do that. But the problem is, you're going to go to trial on September 17th, and I don't think you want to go to trial on September 17th without a lawyer. I'm not going to delay the case. I want you to consider that. I won't delay it. I'm not going to let you become your own lawyer and then this case languishes on my call for a couple years. That's not going to happen. It's going to trial September 17th.

I would ask you to consider whether or not you want to represent yourself, but we start by picking a jury on September

> 17th, whether you want to have yourself represented by competent counsel.
>
> DEFENDANT: I don't want him representing me, your Honor.
>
> THE COURT: You're going to be ready to go on September 17th.
>
> DEFENDANT: No, I'm not.
>
> THE COURT: Well, you're going to go. You can tell me you're not ready all you want, you're still going to go. ***
>
> You need to consider this a little bit. You need to think about this. But you're going to trial September 17th. You have to accept that into your mind. ***"

The court asked the parties to return on September 12, to allow defendant more time to "think about *** whether or not you're going to represent yourself."

¶ 17 On September 12, 2012 defendant told the court that he still wished to proceed *pro se*. The court again told defendant that he would still have to proceed to trial on September 17. The court admonished defendant:

> "THE COURT: Do you understand that you are not going to receive any extra time in the preparation of your defense, as I have already told you? The case is set for trial on Monday and the State has answered ready. I intend to proceed on Monday. Do you understand that you are not going to get any extra time for preparation?

DEFENDANT: No.

THE COURT: Well, that is the case. You are not going to get any extra time. I told you about that when you were in front of me the last time, that the case is set for trial on Monday. This is an '09 case. This is alleged to have happened in 2008, over four years ago. You, while being represented, wanted a jury trial. We set it for a specific date of trial. I ordered the State to get ready and prepare. I've cleared other cases from my calendar so that I can try your case. You're not going to get any extra time."

¶ 18 The defendant asked: "I'm trying to figure out how can I go to trial when I'm not prepared for my case." The court responded: "Because you chose at the eleventh hour to try to delay justice in this case." The defendant denied that he was attempting to delay proceedings. The court responded:

"That's what you're trying to do. You've been sitting around in county jail for three years. Apparently, you've fallen in love over at the county jail with all of the surroundings and you don't want to go to trial. So you think that by firing the lawyers *** that somehow you are going to be allowed to stay here and delay justice *** I am not going to allow you to do that. You are going to trial on Monday."

¶ 19 The court also advised defendant at length that it believed he was making a "very bad decision" by electing to proceed *pro se*. After further admonishments, the court asked defendant

to confirm that he still wanted to waive his right to counsel. Defendant answered affirmatively. At that time, defendant also stated his desire to proceed with a bench trial instead of a jury trial.

¶ 20 The following day, September 13, the State tendered discovery to defendant. Discovery included 139 pages of reports from the Illinois Department of Children and Family Services, and motion transcripts. The court then asked defendant if he was ready to proceed to trial on September 17. Defendant replied that he was not. When the court asked defendant when he would be ready, defendant responded: "I can't say until I look at the paperwork."

¶ 21 The court then remarked:

> "Well, I've been going over the history of this case. It's been pending on either Judge Gainer's call or my call since June 30, 2009. There ha[ve] been multiple pre-trial motions filed and heard. The matter has been set down for trial on several occasions ***.
>
> It had been set with a firm trial date for Monday, the 17th, and that date was set back in July with some status dates in between for discussions between the parties. It was only I believe August 30th, a final status date prior to the jury section process on September 17th, when the defendant decided to go *pro se* ***.
>
> I do believe *** that the defendant's going *pro se* is a tactic designed to be somewhat dilatory to delay the administration of justice by not having this case proceed to trial when it was set. Defendant was admonished if he continued in his attempts to exercise his right in going *pro se* at this late stage, that I did not

> intend to continue the trial, which had been previously an agreed upon trial date."

¶ 22 The court proceed to rule that, although it would not delay the beginning of trial on September 17, it would "partially" grant defendant's request, by asking the State to begin its case with a "less critical" witness:

> "I have perhaps a suggestion that might ease my position a little bit Mr. Miller, and partially at least accommodate your request here and that would be as follows: On Monday I would ask that the State perhaps proceed to begin the trial with a witness, perhaps someone other than the most critical witnesses in the case, which would obviously be the complaining witness, but perhaps some other witness. And then once the trial has been commenced, then I would commence and continue the trial to a later date so Mr. Miller would have an adequate opportunity to review all of the discovery that he has now been tendered so that he could be, at least in his own mind, in a better position to represent himself."

¶ 23 The court thus asked the State if it could begin the trial on September 17 with a witness who was less "critical" than M.B. The State indicated that it would begin with the arresting officer if he was available, or otherwise would call M.B.'s mother as the first witness. The court thus told defendant that he should be prepared to cross-examine those witnesses on the first day of trial.

¶ 24 The bench trial thus commenced on September 17, 2012. At the outset, the court reiterated that, since defendant had "only recently decided to go *pro se*," the court would "start

the trial today with what might be viewed as a noncritical witness and then I will continue it so that [defendant] can have additional time to prepare his defense."

¶ 25 The defendant declined to make an opening statement. After the State's opening statement, it called M.B.'s mother, Elisheba Bingham. Bingham testified that for a number of months in 2008, she and M.B. resided in the same home as defendant and his mother. M.B. was five years old at the time. In December 2008, after M.B. had a visit with her cousins, Bingham took M.B. to a hospital; police were then contacted because M.B. made "allegations of sexual abuse" involving defendant. The following day, M.B. was interviewed at the Children's Advocacy Center.

¶ 26 Following Bingham's testimony, the court asked defendant when he would be ready to resume the trial. Defendant responded: "First week of November." The court declined to continue trial for that length of time, but agreed to continue the trial to October 23, 2012, noting that this was "in excess of a month."

¶ 27 Trial resumed on October 23, 2012. The State called Dr. Nuha Shari, a pediatrician, who had examined M.B. on December 12, 2008. She testified regarding statements by M.B. that "Richard" had touched her in a bad way and engaged in sexual acts with her.

¶ 28 The State next called M.B., who was nine years old at the time of trial. She testified that when she was five, she lived with her mother and defendant. She stated that defendant had touched her in an unwanted way, and that "His private part touched my hands, my mouth and my butt, and my behind." M.B. later told her cousins about how defendant touched her.

¶ 29 Following M.B.'s testimony, the trial was continued until October 31, 2012. On that date, the State called Detective Michael Nolan, who testified that in December 2008, he observed a social worker conduct a forensic interview of M.B. at the Chicago Child Advocacy Center.

Detective Nolan testified regarding M.B.'s statements during the interview, in which she described sexual acts committed by defendant.

¶ 30 Following Detective Nolan, the State called Assistant State's Attorney Thor Martin, who testified that he interviewed defendant in May 2009, during which defendant made inculpatory statements. ASA Martin typed a written statement which was reviewed and signed by defendant. In the statement (which was admitted into evidence), defendant described an occasion in which he put his penis in M.B.'s mouth.

¶ 31 After the State rested on October 31, defendant indicated that he wanted to testify in his own defense but was not yet ready to do so. Defendant asked for a continuance of two weeks, and also requested the limited appointment of counsel to ask him questions during his testimony. Defendant also indicated that he planned to call his sister and mother as defense witnesses.

¶ 32 The court agreed to a continuance; the court also stated that it would ask defendant's former counsel, public defender Ochalla, to assist in asking defendant questions during his testimony. On November 13, 2012, Ochalla agreed to assist in defendant's direct examination, but requested more time to familiarize himself with the recent proceedings. The trial was continued a number of times, to allow Ochalla and defendant time to prepare for his direct examination.

¶ 33 On February 15, 2013, defendant testified. He recalled that after he was arrested on May 27, 2009, the police interrogated him despite his repeated requests for an attorney. He testified that detectives threatened him and that one of the detectives "choked" him. Defendant stated that he requested medical attention and was taken to a hospital, where the detectives continued to interrogate him. After he was brought back to the police station, a detective told him that if he admitted to the substance of M.B.'s allegations, he would be subject to lesser charges. Defendant

testified that he made an inculpatory statement to an Assistant State's Attorney, in order to "get a lesser charge."

¶ 34 After his testimony, defendant indicated that he wanted to call his sister and his mother as witnesses. The court agreed to continue the trial to March 22, 2013. On that date, defendant informed the court that he had told his sister and mother to be in court, but they did not arrive. Defendant requested an additional thirty-day continuance, but the trial court denied that request.

¶ 35 After the State's closing argument, defendant declined to argue. The trial court found defendant guilty of one count of predatory criminal sexual assault and one count of aggravated criminal sexual abuse.

¶ 36 On direct appeal, defendant's counsel raised a single issue, arguing that M.B.'s statements during the forensic interview should not have been admitted. In an order dated February 1, 2016, this court held that the trial court did not abuse its discretion in admitting that evidence, and thus we affirmed defendant's convictions. *People v. Miller*, 2016 IL App (1st) 132579-U.

¶ 37 On March 30, 2016, defendant filed a *pro se* postconviction petition. Among other claims, the petition alleged that defendant was denied effective assistance of counsel on direct appeal, as his appellate counsel failed to argue that "the trial court erred in abusing its discretion by requiring the petitioner to begin trial just three (3) days after receiving discovery" or "that the trial court erred in abusing its discretion when petitioner's request for a continuance was denied."

¶ 38 On May 6, 2016, the trial court dismissed the petition at the first stage of postconviction proceedings. On May 26, defendant filed a timely notice of appeal from that dismissal. Accordingly, we have jurisdiction. Ill. S. Ct. R. 651 (d) (eff. July 1, 2017); Ill. S. Ct. R. 606(b) (eff. July 1, 2017).

¶ 39 ANALYSIS

¶ 40 On appeal, defendant argues that the trial court erred in dismissing his postconviction petition because there is "arguable merit" to his claim that his appellate counsel was ineffective. Specifically, he asserts that his appellate counsel should have raised the claim that "the trial court erred in forcing [him] to begin his trial mere days after" he received discovery. He asserts that this underlying claim has merit because the denial of a trial continuance "arguably denied him the constitutional right to represent himself, and arguably constituted an abuse of discretion."

¶ 41 He suggests his case is analogous to *People v. Walker*, 232 Ill. 2d 113 (2009), in which our supreme court found error where there was no evidence that the circuit court considered the relevant factors before denying a requested trial continuance. Defendant claims that in this case the circuit court "mechanically forced [defendant] to trial simply because trial was scheduled to begin within a few days without consideration of the circumstances." Defendant asserts there was nothing in the record to support the trial court's belief that his request to proceed *pro se* was intended to "delay justice." He claims that the court's refusal to continue the September 17 trial date after he elected to represent himself "arguably infringed upon his right to proceed *pro se* and was arguably an abuse of discretion," and thus his counsel on direct appeal "arguably provided ineffective assistance by failing to challenge the denial of the continuance." As this issue was "arguably meritorious," he claims that appellate counsel's failure to raise it was "arguably prejudicial," such that his postconviction petition could not be summarily dismissed.

¶ 42 "The Post-Conviction Hearing Act (Act) [citation] 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. Tate*, 2012 IL 112214, ¶ 8. A postconviction proceeding contains three

stages. "At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit.' [Citation.] A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. [Citation.] *** Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Id.* ¶ 9. We review the summary dismissal of a postconviction petition *de novo*. *Id.* ¶ 10.

¶ 43 In this case, defendant's postconviction petition was premised on the alleged ineffectiveness of his appellate counsel. Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. [Citation.]" *Id.* at 496. "The *Strickland* standard applies equally to claims of ineffective appellate counsel, and a defendant raising such a claim must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. [Citation.]" *Id.*

¶ 44 "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 or her judgment, are without merit, unless counsel's appraisal is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000).

¶ 45 When a postconviction petition is premised upon a claim of ineffective assistance of counsel, a defendant need not "prove" ineffective assistance to avoid first-stage dismissal. *Tate*,

2012 IL 112214, ¶ 19. Rather, "[a]t the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphases in original). *Id.*

¶ 46 If there is no merit to an underlying argument, there can be no prejudice from appellate counsel's failure to raise it. *Easley*, 192 Ill. 2d at 328-29. We thus consider whether there is merit to the underlying claim that defendant asserts, should have been raised by his counsel on direct appeal, specifically, that the circuit court's denial of his requested trial continuance violated his right to proceed *pro se*, or otherwise constituted an abuse of discretion.

¶ 47 "Both the United States and Illinois Constitutions afford a defendant the right to represent himself or herself at trial. [citations] A defendant's constitutional right to self-representation is as basic and fundamental as the right to be represented by counsel. [Citation.] However, the right to self-representation is not absolute. [Citations.] For example, a defendant's request to proceed *pro se* on the day of trial is untimely when it is accompanied by a request for additional time to prepare. [Citations.] '[A] defendant cannot await the eve of trial and then, hoping for a continuance, announce that he has decided to rely upon his skills rather than counsel's in presenting his defense.' [Citation.] Thus, when the court allows the defendant to proceed *pro se*, it need not grant an extension of time for trial." *People v. Merritt*, 2017 IL App (2d) 150219, ¶ 27.

¶ 48 The trial court in this case *granted* defendant's request to proceed *pro se*, which was first asserted on August 30, less than three weeks before the scheduled trial date, September 17. The crux of the defendant's appeal is whether it is arguable that the trial court erred by failing to *also*

grant a continuance of the trial date. The deferential abuse of discretion standard applies to that ruling:

> "It is well settled that the granting or denial of a continuance is a matter resting in the sound discretion of the trial court, and a reviewing court will not interfere with that decision absent a clear abuse of discretion. [Citation.] However, '[w]here it appears that the refusal of additional time in some manner embarrassed the accused in the preparation of his defense and thereby prejudiced his rights, a resulting conviction will be reversed.'[Citation.]
>
> Whether there has been an abuse of discretion necessarily depends upon the facts and circumstances in each case [citation] and '[t]here is no mechanical test *** for determining the point at which the denial of a continuance in order to accelerate the judicial proceeding violates the substantive right of the accused to properly defend.' [Citation.] Factors a court may consider in determining whether to grant a continuance request *** include the movant's diligence, the defendant's right to a speedy, fair and impartial trial and the interests of justice. [Citations.] Other relevant factors include whether counsel for defendant was unable to prepare for trial ***[citation], the history of the case [citation], the complexity of the matter [citation], the seriousness of the charges [citation] as well as docket management, judicial economy and inconvenience

> to the parties and witnesses. [Citation]." *Walker*, 232 Ill. 2d at 125-26.

¶ 49 As defendant suggests the circumstances of the denial of his requested continuance are analogous to those in *Walker*, we review the facts of that case. In *Walker*, the defendant's trial was set to commence on January 20, 1994. On that date, the public defender "informed the court that she had miscalendared defendant's trial date for January 26" and that she was not yet prepared to go to trial on defendant's case. *Id.* at 127. The trial court responded that "It is irrelevant" and "cut off any further explanation that could be offered by counsel." *Id.* Thus, the trial court forced the public defender to proceed to trial without any further time for preparation.

¶ 50 Our supreme court found this was error, noting "the record clearly establishes that the circuit court completely failed to exercise discretion in ruling on defense counsel's request for a continuance *** as it is devoid of evidence showing that the circuit court considered any of the relevant factors in denying the continuance." *Id.* at 126. Rather, the circuit court "mechanically denied the continuance without engaging in thoughtful consideration of the specific facts and circumstances." *Id.* *Walker* held that "the circuit court's failure to exercise its discretion in reflexively, arbitrarily and mechanically denying defense counsel's request for a continuance was error in that the denial embarrassed the accused in the preparation of his defense and thereby prejudiced his rights." (Internal quotation marks omitted.) *Id.* at 131. As a result, our supreme court held that the *Walker* defendant was entitled to a new trial. *Id.*

¶ 51 We do not find that the circumstances of this case are akin to *Walker*. Rather, we agree with the State that this case more closely resembles *People v. Merritt*, 2017 IL App (2d) 150219, which expressly distinguished *Walker*. In *Merritt*, the trial date was set for March 14. *Id.* ¶ 4. On March 9, defendant informed the court that he wished to have new counsel; the court

declined to appoint new counsel and told defendant that the case would proceed to trial on March 14, the scheduled trial date. *Id.* ¶ 5. On March 14, defendant presented a motion to reconsider his request for substitute counsel "or in the alternative to proceed *pro se*." *Id.* ¶ 6. After the trial court denied the motion to reconsider, defendant argued his motion to proceed *pro se. Id.* ¶ 7.

¶ 52 The court told defendant that "Today is the trial day" and that trial would not be continued, even if he elected to proceed *pro se*. *Id.* The court remarked that: "If you try and fire [counsel] on the morning of trial, it would appear *** that is an attempt to gain a continuance, to thwart the orderly administration of justice." *Id.* After admonishments, defendant stated that he still wanted to proceed *pro se*. *Id.* On the same date, defendant was given discovery materials and trial commenced. *Id.* Defendant was found guilty by a jury, and his conviction was affirmed on direct appeal. *Id.* ¶ 8.

¶ 53 Similar to this case, the *Merritt* defendant filed a *pro se* postconviction petition alleging, *inter alia*, that he was "denied due process when the trial court denied his request for a continuance in order to prepare for trial after electing to proceed *pro se*" and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. *Id.* ¶ 14. The trial court summarily dismissed the petition. *Id.*

¶ 54 On appeal, the *Merritt* defendant (like the defendant in this case) relied on *Walker* to argue that the court erred in denying a continuance at the time he elected to proceed *pro se. Id.* ¶ 23. The Second District of our court acknowledged that the trial court in *Merritt* had denied defendant's request for a continuance "with little analysis," but found there was a "key difference" from the situation in *Walker*:

> "In *Walker*, there was simply no *evidence* that the request was a delay tactic. Here, defendant knew of his upcoming trial and could

> have sought to proceed *pro se* at an earlier date. *** Instead, he waited until the day of trial to make that request. Thus, the trial court did not abuse its discretion, because defendant was not diligent in moving to waive counsel." (Emphasis in original.) *Id.* ¶ 26.

¶ 55 The Second District in *Merritt* proceeded to reject defendant's claim that appellate counsel was ineffective for failing to argue this issue on direct appeal:

> "Here, defendant's request to proceed *pro se* was untimely. Although defendant sought substitute counsel multiple times earlier in the process, he waited until the day of trial to request to proceed *pro se* and seek a continuance for additional time to prepare. The trial court could have denied his request to proceed *pro se* outright, and it cautioned him that the trial was going to move forward that day. Thus, *** defendant's lack of time to prepare was a product of his own making. Further, the trial court allowed defendant to wait until the following day to give an opening statement, and the record shows that defendant was ably assisted by his standby counsel. Thus, *Walker* is distinguishable because, here, defendant's request for a continuance was made in connection with an untimely request to proceed *pro se.* Given the untimely request, the trial court did not abuse its discretion in denying defendant's request for a continuance, and appellate

> counsel was not ineffective for failing to raise the matter on appeal." *Id.* ¶ 32.

¶ 56 Under the record before us, the circumstances surrounding the trial court ruling at issue in this case are much more akin to *Merritt* than to *Walker*, and we cannot say that the trial court abused its discretion. Unlike *Walker*, the trial court in this case did not "mechanically" deny the requested continuance without thoughtful consideration of the relevant factors in exercising its discretion. Rather, in this case, the trial court thoroughly explained its reasoning, emphasizing the long history of the case and defendant's belated request to proceed *pro se*. Unlike *Walker*, the trial court also specifically found that it believed defendant's request was intended to cause delay. There was support for this conclusion in the record, given the history of the case, including numerous prior hearings where defendant could have asserted his right to represent himself. See *Merritt*, 2017 IL App (2d) 150219, ¶ 26 ("defendant knew of his upcoming trial and could have sought to proceed *pro se* at an earlier date.").

¶ 57 We note the defendant's argument that *Merritt* is distinguishable. He emphasizes that in *Merritt* the defendant did not seek permission to proceed *pro se* until the very day of trial; whereas defendant in this case asked to proceed *pro se* on August 30, "nearly three weeks before" the scheduled trial date of September 17. He also points out that the trial court delayed ruling on that request until September 12, and so he did not receive discovery until September 13, mere days before trial.

¶ 58 We recognize these factual differences, but they are insignificant and do not persuade us that the court's decision could be construed as an abuse of discretion, given the extensive history of this particular case. Defendant's emphasis on the fact that he requested to proceed *pro se* three weeks before the scheduled trial date, ignores the fact that he had ample time to do so for *several*

months if not years before he finally expressed his decision to the court. The court noted that the case stemmed from allegations which occurred in 2008. Defendant was charged in 2009. His request to proceed *pro se* was not made until August 2012. Given that history, the court could reasonably find that his request was untimely or intended as a delay tactic. We also cannot fault the court for declining to immediately rule on the August 30 request to proceed *pro se*; the court was within its discretion to delay its ruling to give defendant time to consider whether he still wanted to proceed *pro se*, given the trial court's warning that the trial date would not be postponed.

¶ 59 We also note that, despite its decision not to delay the *commencement* of the September 17 trial, the trial court otherwise extended the trial schedule and made other accommodations, in recognition of defendant's *pro se* status. Significantly, the trial court expressly indicated that it sought to "partially" accommodate defendant's request for a continuance, by instructing the State to begin its case with a less critical witness, and then granting a lengthy continuance before the remainder of the State's case proceeded. As a result, the first day of trial included brief testimony from only one witness before the court granted defendant a continuance of *over one month* to prepare for the State's remaining witnesses. Furthermore, after the State rested its case on October 31, 2012, the trial court granted defendant additional time to prepare his defense. The court also granted defendant's request for counsel to assist him in his direct examination. Thus, the trial court did not resume the trial with defendant's testimony until February 15, 2013, approximately two and a half months following the conclusion of the State's case-in-chief. These rulings undermine defendant's suggestion that he suffered prejudice from the trial court's decision to decline delaying the original trial date.

¶ 60 Under these circumstances, we do not find arguable merit to the underlying claim that the trial court abused its discretion in denying defendant's request to delay the commencement of the trial. In turn, we conclude that defendant was not prejudiced by his appellate counsel's failure to raise this claim on direct appeal. Accordingly, his postconviction petition's claim of ineffective assistance of appellate counsel lacks arguable merit, and summary dismissal was proper.

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 62 Affirmed.