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3-09-0823

Order Filed March 16, 2011

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	For the 13th Judicial Circuit
	)	LaSalle County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 90-CF-257
	)	
GREGORY ENNIS,	)	
	)	Honorable Cynthia Raccuglia,
Defendant-Appellant.	)	Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Wright and Holdridge concurred in the judgment.

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**ORDER**

*Held:* The trial court did not abuse its discretion in failing to allow defendant to represent himself at his postconviction proceedings.

Defendant Gregory Ennis filed a postconviction petition following his conviction and sentence for murder. On appeal, Ennis alleges the trial court should have allowed him to proceed *pro se* in the postconviction proceedings because he clearly and unequivocally expressed the desire to do so. We affirm the trial court.

FACTS

Following a jury trial in August 1991, defendant Gregory Ennis was convicted of murder (Ill. Rev. Stat. 1991, ch. 38, par. 9-1(a)(1)) and sentenced to 60 years' imprisonment. His conviction and sentence were affirmed by this court on February 2, 1993. *People v. Ennis*, No. 3-91-0752 (1993) (unpublished order under Supreme Court Rule 23). Ennis filed a *pro se* petition for postconviction relief on May 2, 2005. The public defender was appointed to represent Ennis and counsel filed an amended petition. Following a hearing, the trial court granted the State's motion to dismiss the amended petition as untimely. On appeal, this court reversed the order of dismissal and remanded the cause for further postconviction proceedings, giving the defendant the opportunity to amend his petition to properly assert allegations of ineffective assistance of counsel "with reasonable assistance of counsel." *People v. Ennis*, No. 3-06-0261 (2008) (unpublished order under Supreme Court Rule 23). On November 10, 2008, Ennis filed a *pro se* motion for the appointment of different counsel, alleging, among other accusations, that his attorney had discouraged one of his alibi witnesses from coming to court and falsely told the defendant the witness would place him at the scene of the crime. Ennis received a different public defender to represent him. For the second time, the State filed a motion to dismiss Ennis's amended postconviction petition as untimely.

At a hearing on May 7, 2009, called to set a date to hear the State's motion to dismiss, the trial court addressed Ennis, stating:

"I understand you have some problems with your public defender. \*\*\* You need to understand that unless you allege, in some fashion, an issue concerning ineffective assistance of counsel, that meets the standards, you are going to have [counsel as appointed]. Your allegations in this matter do not seem to have merit. "

Ennis responded that his attorney's version of events contradicted what Ennis's witness said was the conversation she had with counsel. The trial court advised Ennis he needed to furnish affidavits to support his allegations. A hearing date for the State's motion was set.

On May 15, 2009, Ennis wrote a letter to the trial court in which he stated his appointed counsel refused to provide him the address of one of his witnesses. He also submitted an affidavit stating that because of the ineffectiveness of his counsel he wished to proceed *pro se*. In a hearing held on July 9, 2009, the trial court referred to Ennis's correspondence and "motions" and explained that it was important that he have representation. The trial court invited Ennis to discuss the issue. Ennis stated to the trial court that his witness was not coming forward because his attorney had intimidated her with the threat of a lie detector test and possible "jail." The trial court indicated to Ennis that he needed to provide a statement under oath from his witness. The trial court further stated, "I may let you represent yourself. But I want to look into this first."

At a subsequent hearing on August 13, 2009, the trial court inquired of Ennis: "I need to know whether you are insistent, at this point, that you continue on representing yourself?" Ennis responded that he had to represent himself because the record indicated his counsel had done nothing to assist him. The trial court invited counsel to address Ennis's allegations. Counsel responded he had contacted a "couple of witnesses that [Ennis] claimed could have helped him at trial" and that after interviewing the witnesses, counsel believed they had no testimony that would help Ennis. Counsel stated, "that is why I did not amend the post-conviction petition [or] attach any affidavits." Counsel noted that although Ennis had told him he had letters from a witness, Ennis had not provided them to counsel. When the trial court inquired of Ennis, "[t]ell me what you want," he responded that his witness had told him she sent an affidavit to the prison, however, because of a

“back up” in the mail, he could not receive it yet. The trial court told Ennis counsel would continue to represent him on the State’s motion to dismiss because counsel had shown he had done what he could. The trial court informed Ennis that because his postconviction petition concerned his claim of actual innocence and additional witnesses, he had to have the evidence to support his contentions or no amended petition could be filed. The trial court indicated it was scheduling a hearing on the State’s motion to dismiss and encouraged Ennis to obtain an affidavit from the witness who, Ennis said, had indicated his counsel had intimidated her.

On October 8, 2009, the trial court heard and granted the State’s motion to dismiss Ennis’s petition as untimely. At the hearing, defense counsel informed the trial court that the witnesses Ennis had pointed out had been interviewed and that they provided no assistance to the defendant in terms of either his actual innocence or lack of accountability. Counsel also filed a Supreme Court Rule 651(c) certificate. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The trial court invited Ennis to “put on the record \*\*\* anything [he] wanted to say.” The trial court referred specifically to Ennis’s allegation that counsel had intimidated a potential witness. Ennis responded that he had sought repeatedly to obtain a supporting affidavit, however, he had not received a response from the witness. Ennis stated,

“ I understand what [counsel] mean[s], \*\*\* but a conflict of interest from my opinion is if she tell[s] me one thing, and \*\*\* tell[s] him another. I understand he works for me. But he also works for the State.”

Ennis expressed his thought that a better plan would be to subpoena the witnesses. The trial court responded that the “system” could not subpoena people without knowing what they would say. The

trial court also pointed to its knowledge of counsel's skill and integrity and noted that although the State's motion was predicated on timeliness, if the trial court had any indication Ennis's petition should proceed on the merits, the trial court would respond in "the interest of justice." The trial court noted that even given ample time, Ennis had provided no support for the allegations in his postconviction petition. The trial court granted the State's motion to dismiss. Ennis followed with this appeal.

### ANALYSIS

On appeal, Ennis raises one issue and that is whether the trial court erred in failing to allow him to represent himself in the postconviction proceedings. The State admits case law does support Ennis's contention that he had a right to waive appointed counsel in a postconviction proceeding. The State asserts, nevertheless, that Ennis did not make an unequivocal request to proceed *pro se*, or if he did, he later abandoned his request.

As acknowledged by the State, Ennis had the right to waive appointed counsel for the postconviction proceedings. *People v. French*, 210 Ill. App. 3d 681, 690 (1991) (finding defendant could not effectively claim ineffective assistance of counsel where he exercised his right to waive counsel in postconviction proceeding). This acknowledgment is in keeping with the general rule that a criminal defendant has a constitutional right to represent himself if he makes an unequivocal request to do so. *People v. Rohlf*s, 368 Ill. App. 3d 540, 544 (2006). A defendant's request to represent himself must be clear and unequivocal, not ambiguous. *People v. Burton*, 184 Ill. 2d 1, 21 (1998). If a defendant does not "articulately and unmistakably demand[ ] to proceed *pro se*[,]," he waives his right to self-representation. (Internal quotation marks omitted.) *Burton*, 184 Ill. 2d at 22. In determining whether a defendant has made a clear and unequivocal request to represent himself,

courts look to the overall context of the proceedings to determine whether the defendant truly desires to represent himself and has definitively invoked the right to do so. *Burton*, 184 Ill. 2d at 22. Even if a defendant gives some indication he wants to proceed *pro se*, the defendant may later acquiesce by vacillating or abandoning the earlier request. *Burton*, 184 Ill. 2d at 23. Furthermore, a defendant may forfeit self-representation by remaining silent at critical junctures of the proceedings. *Burton*, 184 Ill. 2d at 24. Courts must “ ‘indulge in every reasonable presumption against waiver’ ” of the right to counsel. *Burton*, 184 Ill. 2d at 23 (quoting *Brewer V. Williams*, 430 U.S. 387, 404 (1977)). On review, the trial court's decision on a defendant's election to represent himself will be reversed only if the trial court abused its discretion. *Rohlf*s, 368 Ill. App. 3d at 545.

In the instant case, we do not believe the trial court abused its discretion in continuing to conduct proceedings with counsel representing Ennis where the record overall does not support a finding that Ennis clearly and unequivocally expressed a desire to represent himself. It appears from the context in which Ennis's requests were made that his primary concern was that he could not either connect with his witnesses or obtain the necessary witness affidavits to support the allegations of his postconviction petition. For this reason, Ennis felt he “had to represent himself.” The trial court was responsive to Ennis's concerns, spent ample time exploring the issue with Ennis and his counsel, and allowed Ennis to repeatedly voice the issue for the record. Furthermore, Ennis was given time to obtain confirmation to support his allegation that counsel was obstructing his witnesses. Ennis appeared to acquiesce in the trial court's request that he substantiate his request to represent himself, although he never did provide support for his allegation. At the final hearing, Ennis acknowledged that despite his repeated requests his witness was not responding to him. He also retreated from his earlier allegation that counsel had obstructed his witness when he stated, “I

understand what [counsel] mean[s],” and defined the conflict as one in which his witness told him one thing and told counsel another. Furthermore, at the final hearing, Ennis did not definitively renew any request to represent himself. Under these circumstances, we conclude Ennis did not unequivocally and forcefully invoke his right to represent himself and the trial court did not force counsel upon him. Instead of explicitly waiving any right to representation, Ennis engaged in a prolonged discussion with the trial court about whether he would do so. For these reasons, we conclude the trial court did not abuse its discretion in failing to allow Ennis to represent himself.

For the foregoing reasons, the judgment of the circuit court of LaSalle County is affirmed.

Affirmed.