

NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2022 IL App (4th) 210524-U
NO. 4-21-0524
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 17, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
Plaintiff-Appellee,) Circuit Court of
v.) Edgar County
FRED E. COX,) No. 14CF121
Defendant-Appellant.)
) Honorable
) Matthew L. Sullivan,
) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices DeArmond and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel did not provide unreasonable assistance and the circuit court did not commit error by accepting defendant’s waiver of counsel or by failing to address defendant’s claim of counsel’s potential conflict of interest.
- ¶ 2 An Edgar County jury found defendant, Fred E. Cox, guilty of one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)), for which the trial court sentenced him to 24 years’ imprisonment. His direct appeal was unsuccessful. See *People v. Cox*, 2019 IL App (4th) 160696-U. Defendant filed a *pro se* postconviction petition, and the circuit court appointed counsel to represent him. After investigating defendant’s claims, appointed counsel determined they were without merit. Thereafter, defendant advised the court he wished to proceed *pro se*. After the court admonished defendant, the court allowed counsel to withdraw.

¶ 3 Defendant filed a *pro se* amended petition raising one error—an error he did not raise in the initial petition. Upon the State’s motion, the circuit court dismissed the petition because defendant had not alleged or demonstrated any prejudice resulting from the purported error. Defendant appeals from the dismissal order, claiming (1) his postconviction counsel provided unreasonable assistance in evaluating the claims raised in his *pro se* petition, (2) the court erroneously accepted defendant’s waiver of counsel because it was not knowing and voluntary, and (3) the court erred by failing to conduct an adequate inquiry into his claim of a potential conflict of interest. We affirm the court’s judgment dismissing defendant’s amended postconviction petition.

¶ 4 I. BACKGROUND

¶ 5 In July 2014, defendant was charged with criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2014)), and predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)). A jury convicted defendant of predatory criminal sexual assault. Defendant filed a motion for a new trial, submitting the trial court committed error by admitting evidence of defendant’s prior conviction for criminal sexual assault. Defendant also filed a motion seeking to continue the sentencing until deoxyribonucleic acid (DNA) testing on certain evidence had been completed. After an evidentiary hearing relative to the DNA test results, and hearing arguments by the parties, the court denied both motions. The court sentenced defendant to 24 years’ imprisonment.

¶ 6 Defendant took a direct appeal alleging the following reversible errors occurred: “(1) the [trial] court ruled that defendant’s sexual misconduct in 1993 and 1994 against his preteen stepdaughter was admissible, (2) the court allowed the jury to have a certified copy of defendant’s 1994 conviction during deliberations, (3) the prosecutor committed error during his closing

argument, (4) the court ruled that certain hearsay statements would be admissible under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)), and (5) the court erred in denying defendant's motion for a new trial on the basis of newly discovered evidence." We affirmed the trial court's judgment. *People v. Cox*, 2019 IL App (4th) 160696, ¶ 2.

¶ 7 We held, as to the first claim relevant to this appeal, defendant forfeited his claim challenging the jury's consideration of the certified copy of his prior conviction because he consented to the purported error, precluding plain-error review. *Id.* ¶ 71. We noted the only challenge available to defendant upon acquiescence would be a claim of ineffective assistance of counsel. *Id.* ¶ 72. We did not however "specifically suggest" defendant raise this in a postconviction petition.

¶ 8 As to defendant's claim of prosecutorial misconduct during the State's closing argument, we also found he forfeited the issue by failing to object at trial. *Id.* ¶ 75. We did not reach a plain-error analysis because, though defendant mentioned plain error, he did not make an argument which would have permitted us to do so. *Id.*

¶ 9 As to defendant's last relevant claim on his direct appeal, we held defendant forfeited his claim by failing to object at trial to the trial court's admission of a recording of an interview of the victim at a child advocacy center by a law enforcement official. *Id.* ¶ 78. For the first time, on direct appeal, defendant also challenged the credentials of the interviewer, a claim which we found was also procedurally defaulted for his failure to object. *Id.* ¶ 81.

¶ 10 In a January 9, 2020, *pro se* petition, defendant sought postconviction relief, raising five claims: (1) trial counsel forfeited defendant's ability to challenge the jury's viewing of his prior conviction when counsel acquiesced, (2) trial counsel forfeited his objection to prosecutorial misconduct by failing to object at trial, (3) trial counsel forfeited his objection to the admission of

the recorded interview of the victim by failing to object at trial, (4) the trial court committed error by denying the motion for a new trial based on newly discovered evidence, and (5) the charging instrument was not valid because it did not identify the victim in some manner as required as of January 1, 2014, defendant having been charged in July of 2014 (at least it appears defendant tried to frame this claim if his *pro se* petition is read liberally).

¶ 11 Shortly after defendant’s filing, the circuit court appointed counsel to assist him. Several months later, appointed counsel filed a notice indicating she had complied with the provisions of the Post-Conviction Hearing Act (Act), citing section 122-1 of the Act (725 ILCS 5/122-1) (West 2020)). The notice advised she had reviewed the record, the State’s discovery, defendant’s pleadings, and our order on direct appeal. As well, she reported she researched the issues defendant raised and corresponded with him. As a result, she concluded she identified no “substantial denial” of defendant’s rights under either the Constitution of the United States or the Constitution of the State of Illinois. She also noted each of the issues defendant raised in his postconviction petition had been addressed on direct appeal. Based on these factors, she advised she was “unable” to file an amended or supplemental postconviction petition for defendant.

¶ 12 Subsequently, the parties appeared before the circuit court on defendant’s postconviction petition. Appointed counsel advised she (1) had spoken to defendant and written him a couple of letters relative to his claims, (2) concluded there was no “valid reason” to file an amended petition, and (3) was advised by defendant to withdraw as counsel so he could proceed *pro se*.

¶ 13 The circuit court then engaged in a colloquy with defendant during which he confirmed multiple times he wished for his attorney to withdraw. He believed he was competent to represent himself. The court warned defendant “it’s generally not a good idea to represent

yourself” and that he would be required to adhere “to various technical rules.” The court noted attorneys have experience and training relevant to the postconviction process, and the State would be represented by experienced counsel. Because of this, the court advised the State might have an advantage producing “unintended consequences” thus putting defendant at a “disadvantage.” The court noted defendant would “receive no special consideration” and reminded him of the “important assistance” an attorney could provide.

¶ 14 In addition, the circuit court specifically advised defendant, should he appeal an adverse decision, he “could not complain about the competency” of his representation if he represented himself. Throughout, defendant repeatedly acknowledged he understood the court’s admonitions, and at times, asked the court a question or to clarify its statements. After the foregoing, the court again asked defendant if he wanted to represent himself to which he replied he did. The court noted defendant was “competent to represent himself” and discharged his appointed counsel. Pursuant to defendant’s request, the court permitted him three months to file an amended postconviction petition.

¶ 15 Approximately one month later, defendant filed an amended *pro se* petition, alleging only the failure of both trial and appellate counsel to challenge the validity of the charging instrument because it did not identify the victim as required by statute. (725 ILCS 5/111-3 (a-5) (West 2014)).

¶ 16 At the first hearing on defendant’s amended petition, the State advised it had not received a copy of the petition and asked for 30 days to respond. Defendant then advised the circuit court his recently withdrawn counsel had earlier represented the victim’s mother, around the time the State charged defendant, in an order-of-protection proceeding against him. For that reason, defendant felt his appointed attorney was laboring under a conflict of interest. The court asked

defendant to clarify what relief he was seeking, to which he advised he simply wanted the court to know about the conflict. The court then inquired whether defendant wanted the court to appoint a different attorney. Defendant advised he did not want the court to appoint someone else but wanted “to go ahead and go forward from here.”

¶ 17 Given defendant’s responses, the circuit court again asked defendant if he still wanted to proceed as his “own attorney” on the amended petition, or if he was asking the court to appoint another attorney. Defendant again confirmed he wanted to proceed *pro se* and was not seeking the appointment of counsel. In addition, the court advised defendant proceeding in this manner forfeited any opportunity to later complain the court should have appointed another attorney. Defendant answered he was “clear with that.”

¶ 18 Subsequently, the State filed a motion to dismiss the amended petition. After hearing the arguments of the parties, the circuit court granted the State’s motion, finding defendant had not alleged or demonstrated any prejudice from the omission of the identity of the victim in the charging instrument. The court noted, and defendant admitted, he knew who the victim was and prepared his defense accordingly.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. Standard of Review

¶ 22 Our review of this second stage dismissal of the postconviction petition is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A defendant may collaterally attack a criminal conviction for substantial deprivations of federal or state constitutional rights pursuant to the Act (725 ILCS 5/122-1 *et seq.* (West 2020)). There can be three stages in such a proceeding. If the postconviction petition is not summarily dismissed at the first stage by the circuit court as

“frivolous and patently without merit,” it advances to the second stage. At the second stage, the court may appoint counsel for the defendant to assist with review of the record and amendment of the petition, which amended petition the State can either move to dismiss or answer. *Pendleton*, 223 Ill. 2d at 472.

¶ 23 B. Defendant’s Attorney Provided Reasonable Assistance

¶ 24 Defendant asserts his postconviction counsel failed to provide reasonable assistance by failing to amend the petition to include an allegation of ineffective assistance of appellate counsel. He claims appellate counsel was ineffective for failing to preserve issues relating to the ineffective assistance of trial counsel.

¶ 25 At the outset, we note defendant argues extensively his appointed counsel’s efforts were not reasonable because she erroneously concluded all the issues had been raised on direct appeal. Though counsel’s pleading does contain the foregoing representation, when read as a whole, the gist of the pleading was she did not believe there were any meritorious issues to raise. Her representations at the hearing underscore her belief there had not been a substantial denial of defendant’s constitutional rights. Thus, our focus is whether she provided defendant with reasonable assistance.

¶ 26 A defendant in a postconviction proceeding is entitled to reasonable assistance of counsel, but that does not rise to the level of assistance constitutionally required at trial. *People v. Greer*, 212 Ill. 2d 192, 204 (2004). Such reasonable representation requires the performance of specific duties pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). *Id.* at 204-05. Among other tasks, postconviction counsel must demonstrate counsel (1) consulted with the defendant to determine the nature of his assertions of constitutional deprivations, (2) examined the

record, and (3) made any amendments to the *pro se* petition required to adequately present the defendant's claims. *Id.* at 205.

¶ 27 The duty to make amendments, however, does not include the obligation to make frivolous claims, as such claims are not “necessary” within the meaning of Rule 651(c). *Id.* In fact, postconviction counsel, “who determines that defendant’s claims are meritless cannot in good faith file an amended petition on behalf of defendant.” *Id.* Continuing representation when a defendant wishes to pursue meritless claims is contrary as well to the legislature’s intentions. *Id.* at 209. Not only does the Act not require the attorney to continue representing a postconviction defendant in such a situation, the attorney’s ethical obligations prohibit one from doing so. *Id.*

¶ 28 Defendant’s counsel concluded there were no meritorious issues she could pursue on defendant’s behalf. The purported failures to assert the ineffectiveness of appellate counsel for not raising the ineffectiveness of trial counsel revolve around three issues: (1) trial counsel’s acquiescence to allowing the jury to have a certified copy of defendant’s prior conviction, (2) trial counsel’s failure to object to the State’s closing argument about propensity, and (3) trial counsel’s failure to object to the admission of the recording of the interview of the child victim.

¶ 29 Failing to object in such instances are matters of trial strategy, which “generally may not form the basis of a claim of ineffective assistance of counsel.” *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 94. As well, if there is no error to object to, an ineffective-assistance-of-counsel claim cannot be made. *Id.* Effective assistance of counsel does not require trial counsel to make futile objections. *Id.* ¶ 95. Legitimate trial strategy can be refraining from objecting to avoid the risk of “appearing obstructionist to the jury.” *Id.* For this reason, there is a presumption that actions of trial counsel are strategic ones, as opposed to the

result of incompetence, such that courts of review do not second-guess decisions left to their discretion. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 31.

¶ 30 As for the claims of ineffective assistance relative to trial counsel's permitting the jury to have a certified copy of defendant's prior conviction, a defendant is only entitled to competent representation, not perfect. *People v. Peel*, 2018 IL App (4th) 160100, ¶ 39. Even trial counsel's strategic mistakes do not necessarily render representation ineffective. *Id.* Successful defendants must still demonstrate trial counsel's deficient performance resulted in prejudice. *Id.* Herein, the prior victim testified extensively about defendant's actions underlying his previous conviction, which the circuit court admitted as propensity evidence, such that the jury was well-acquainted with defendant's prior conduct. Given this, postconviction counsel could have reasonably concluded no prejudice resulted from trial counsel's actions.

¶ 31 Thus, defendant's postconviction counsel provided reasonable assistance of counsel. She could have reasonably concluded the types of errors defendant complained of would not support ineffective-assistance-of-counsel claims. Further, she performed the duties imposed by Rule 651(c), and concluded there was no substantial denial of defendant's rights meriting an amended petition for postconviction relief based on trial counsel's decisions.

¶ 32 Notably, the trial court's dismissal was not based on postconviction counsel's representations as defendant suggests. Defendant explicitly rejected his attorney's advice and her representations to the court. Instead, he determined to go forward without counsel and file his own defective amended postconviction petition. It was his failure to allege or demonstrate prejudice that led to the court's dismissal. Defendant proceeded despite the court's repeated inquiries and warnings about the perils of proceeding *pro se*. The court also specifically advised defendant he would be unable to complain of the competency of counsel if he represented himself.

¶ 33 Defendant cites several cases for the proposition his counsel had an affirmative duty to amend the petition to allege the ineffective assistance claims, but they are distinguishable. In the first, it was counsel's failure to amend which prevented the circuit court from considering the merits. *People v. Turner*, 187 Ill. 2d 406, 413 (1999). Herein, it was defendant's intervening action that prevented the court from considering the claims. However, putting that aside *arguendo*, *Turner* is qualitatively different: counsel therein (1) failed to amend to add claims related to material evidence allegedly withheld by the State and (2) failed to attach affidavits supporting claims based on evidence outside the record, even an affidavit from the defendant identifying people with knowledge. *Id.* at 413-14. Due to postconviction counsel's multiple failures, the assistance was not reasonable, and was, in fact, "a total failure of representation." *Id.* at 414-15.

¶ 34 In another matter defendant proffers, postconviction counsel's conduct was "patently unreasonable" for failing to attach to an amended petition a police report relevant to the defendant's claims, and for failing to raise the ineffectiveness of appellate counsel for not raising trial counsel's ineffectiveness. *People v. Kluppelberg*, 327 Ill. App. 3d 939, 947 (2002). Given there is no suggestion here that postconviction counsel failed to attach available documentation to support defendant's claims, and it was defendant's actions that prevented the circuit court from considering his claims, neither of these authorities is helpful to defendant's cause.

¶ 35 Defendant also cites *People v. Kirk*, 2012 IL App (1st) 101606. There, postconviction counsel "effectively admitted" the defendant had an ineffective assistance claim by arguing such to the circuit court but failing to add the claim to the petition. *Id.* ¶¶ 27, 31. Similarly, in *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 25, postconviction counsel argued before the circuit court about appellate counsel's ineffectiveness but failed to amend the postconviction petition to make such claim. Thus, counsel's assistance was not reasonable. *Id.* ¶ 26. In short, in

both instances, postconviction counsel identified a claim each believed had merit, but failed to amend the postconviction petition to add such a claim. Here, defendant's counsel made no such determination or statement to the circuit court suggesting she believed any of defendant's claims had merit. In fact, she consistently stated the opposite.

¶ 36 For the foregoing reasons we conclude postconviction counsel provided reasonable representation to defendant, and her representation was not the cause of the circuit court's dismissal of the amended petition for postconviction relief. His counsel consulted and communicated with defendant, researched what he proffered, and reviewed the record. She determined there was no meritorious claims requiring an amended petition. She did what she was ethically bound to do. She advised the court and moved to withdraw. In short, because counsel determined defendant's claims were frivolous, they were not "necessary" within the meaning of Rule 651(c).

¶ 37 C. Defendant Knowingly and Voluntarily Waived His Right to Counsel

¶ 38 Defendant asserts his waiver of his right to counsel was not knowing and voluntary because it was the product of postconviction counsel's determination there was no meritorious issue warranting an amended petition for postconviction relief. In short, he argues he was misled, and therefore did not knowingly and voluntarily waive his right to representation.

¶ 39 The Act provides a defendant has a right to appointed counsel. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 22. A defendant can waive such right, but the waiver must be knowing and intelligent. *Id.* ¶ 23. The waiver must not be ambiguous, and must be clear, articulate, and unmistakable. *Id.* The court must determine if proceeding *pro se* is what the defendant truly desires, which is particularly fact dependent. *Id.* We review a court's acceptance of a waiver of counsel under the Act for an abuse of discretion. *Id.* A court commits an abuse of discretion only

when its decision “is arbitrary and without a logical basis.” *People v. Washington*, 2016 IL App (1st) 131198, ¶ 50.

¶ 40 At the hearing when postconviction counsel advised the circuit court she believed there was no meritorious reason to amend the postconviction petition, the court engaged in an extensive colloquy with defendant about his desire to proceed *pro se*. *Inter alia*, defendant acknowledged in response to the court’s explanations and questions he understood: (1) the court’s warning “it’s generally not a good idea to represent yourself,” (2) he would be required to comply with “various technical rules,” (3) attorneys have substantial experience and training and an experienced one would represent him, (4) he might “be at a disadvantage” representing himself, (5) he would receive “no special consideration from the court,” (6) an attorney could provide “important assistance,” and (7) in the case of an appeal, he could not then “complain about the competency” of his representation. As well, the court asked defendant to confirm both before and after the foregoing exchange he wanted the court to discharge his attorney and permit him to proceed *pro se*. Defendant did so unequivocally on each occasion.

¶ 41 Further, four months later when defendant asserted a potential conflict of interest, the circuit court asked defendant three times over the course of the hearing whether defendant wanted a different attorney appointed to represent him. Each time defendant emphatically answered he did not wish the court to appoint another attorney. The court also asked defendant if he understood, given his choice, he would not be entitled to later claim the court should have appointed different counsel. Defendant advised he was “clear with that.” Defendant also reaffirmed his desire for postconviction counsel to withdraw.

¶ 42 Thus, defendant’s claim he did not clearly and knowingly waive counsel due to postconviction counsel’s evaluation is belied by the record. Likewise, his claim he wanted an

attorney, just not the one the court originally appointed, conflicts with the record. Not only did the circuit court thoroughly warn defendant about the pitfalls he might face, but defendant flatly refused the appointment of other counsel. Therefore, the court's acceptance of defendant's waiver of counsel was not arbitrary or without basis. The waiver was unambiguous and repeated even after the passage of time. We find the court did not abuse its discretion.

¶ 43 D. The Trial Court Committed No Error as to the Purported Conflict of Interest

¶ 44 Defendant asserts when he raised the "potential" conflict of interest of postconviction counsel the circuit court should have investigated his claim or obtained a waiver from him. As noted, the court permitted postconviction counsel to withdraw with defendant's concurrence on March 4, 2021. It was not until July 12, 2021, that defendant alleged his withdrawn attorney had a conflict. At that hearing, however, defendant advised the court he simply desired to press on and declined the court's offer to consider the appointment of new counsel.

¶ 45 We review questions of law, such as the existence of a conflict of interest, *de novo*. *People v. Yost*, 2021 IL 126187, ¶ 35. The two types of conflicts we recognize are actual and *per se*. *Id.* ¶ 37. There are three sub-types of the latter recognized, only two of which could apply here: (1) where counsel "contemporaneously represents a prosecution witness" or (2) when counsel has a "contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution." *Id.* ¶ 66. Our supreme court has made it clear the "contemporaneous" component is crucial to finding such a *per se* conflict. *Id.* ¶¶ 58-68.

¶ 46 As for actual conflicts, "a defendant must identify an actual conflict that adversely affected his counsel's performance." *Id.* ¶ 38. This requires the identification of "a specific deficiency in his counsel's strategy, tactics, or decision making that is attributable to the

alleged conflict.” *Id.* The defendant must offer more than “[s]peculative allegations and conclusory statements” to prevail. *Id.*

¶ 47 Regarding defendant’s suggestion of a *per se* conflict, there is nothing in the record evidencing postconviction counsel had a contemporaneous relationship with defendant and the victim’s mother, whether as a prosecution witness or as otherwise associated with the prosecution. Defendant’s counsel, he alleges, represented the victim’s mother in an order of protection matter against him “back when this case started.” Given the State initiated this matter in 2014, counsel’s representation of the victim’s mother would have been six or seven years prior to her 2021 representation herein. In fact, the State commented postconviction counsel might have represented the victim’s mother as a witness at trial, which occurred in December 2015. There is nothing to suggest counsel’s representation of the victim’s mother continued beyond representation in the order-of-protection matter, or possibly as a witness at trial, and we will not speculate that it did. It is, however, reasonable for us to conclude, given the manner of these prior proceedings, postconviction counsel’s representation of the victim’s mother terminated more than five years prior to her representation of defendant. See, *e.g.*, *People v. Free*, 112 Ill. 2d 154, 169 (1986). Thus, we cannot conclude there was any element of contemporaneous representation of defendant and the victim’s mother. As a result, we find postconviction counsel was not laboring under a *per se* conflict of interest.

¶ 48 Defendant proffers *People v. Coleman*, 301 Ill. App. 3d 290 (1998), and *People v. Acevedo*, 2018 IL App (2d) 160562, support his *per se* conflict argument. Both are factually distinguishable because in both instances defense counsel contemporaneously represented the State’s witnesses. *Coleman*, 301 Ill. App. 3d at 291-93; *Acevedo*, 2018 IL App (2d) 160562, ¶ 4.

¶ 49 As for defendant’s assertion of the possibility of an actual conflict, defendant fails to sufficiently identify a specific deficiency in counsel’s conduct that adversely affected him. Defendant suggests we rely on speculation and conclusory statements there “could” have been an actual conflict. As well, defendant asks us to presume prejudice based on his claim postconviction counsel’s “erroneous determination” defendant’s issues were addressed on direct appeal. We will not do either. We have already determined, as set forth above, postconviction counsel provided reasonable assistance, and we do not revisit that here. Further, defendant’s claim he did not knowingly waive the asserted conflict goes hand-in-hand with his claim he did not knowingly waive counsel. Such claims are simply not supported by the record.

¶ 50 Defendant further claims the circuit court did not provide him with the “necessary tools” to decide to proceed *pro se*. We again reject this claim. The court asked defendant several times if he wanted the court to appoint a different attorney, but defendant declined on each occasion. Instead, defendant persisted in going forward without counsel. It is difficult to imagine anything else the court could have done to address defendant’s claim of a conflict of interest. As defendant has not identified any specific action of his counsel resulting in prejudice, we find postconviction counsel did not have an actual conflict representing defendant either.

¶ 51 Therefore, we find the circuit court did not commit error addressing defendant’s claim postconviction counsel had a conflict of interest.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the circuit court’s judgment.

¶ 54 Affirmed.