2017 IL App (3d) 150673-U

Order filed September 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0673 Circuit No. 10-CF-1096
TERRY PAYTON,	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is reversed and the cause is remanded for second-stage proceedings.

¶ 2 Defendant, Terry Payton, appeals from the circuit court's summary dismissal of his first-stage postconviction petition. Defendant argues that the dismissal was erroneous because his petition stated the gist of a claim that he was denied his right to counsel during plea negotiations and entry of the guilty plea. We reverse and remand.

¶ 3 FACTS

¶ 4 On November 9, 2010, the State charged defendant with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and one count of burglary (720 ILCS 5/19-1(a) (West 2010)). The court appointed public defender William Loeffel to represent defendant.

¶ 5 At an April 8, 2011, hearing, Loeffel informed the court that he and defendant had a disagreement as to how to proceed on the case. During a meeting at the county jail, defendant told Loeffel that he no longer wanted his representation. Defendant told the court that he wanted to represent himself. The court admonished defendant of the charges and potential sentencing range. The court also admonished defendant of his right to counsel. Following the admonitions, defendant elected to represent himself and Loeffel withdrew.

¶ 6 At the September 1, 2011, hearing, the court readmonished defendant of the ramifications of his decision to proceed *pro se*. The court explained that self-representation is a complex matter and defendant would be subject to technical rules that he was likely unaware of and would pose a disadvantage at trial. Defendant initially responded "I would prefer to be represented by counsel." However, after the court explained to defendant that counsel would handle all discovery matters and the appointment of counsel would delay matters, defendant sought time to contemplate his request. The next day, defendant elected to remain *pro se*.

¶ 7 On November 3, 2011, the case was called for a hearing on defendant's motion to quash indictment. At the beginning of the hearing, the State noted that defendant had been admonished several times about representing himself, but had not been admonished of the potential for consecutive sentences. The court proceeded to readmonish defendant of the potential sentence for each charge as well as the potential that the sentences would be ordered to run consecutive. Defendant indicated that he understood the potential sentencing ranges. Defendant also stated

that he thought the 15-year firearm enhancement was unconstitutional. Nevertheless, defendant reasserted his desire to represent himself.

¶ 8 On November 23, 2011, defendant sought an original copy of the police report. The court advised defendant that the report may not be admissible into evidence, and when defendant expressed an intent to use the police report, the court responded

> "I told you you can have an attorney. You don't want one. Don't try to drag me into being your attorney. Every time you come out you try to do that. Each time progressively I'm getting more and more frustrated because we go over the same thing every time. My answer is always the same. I'm not your attorney. I have given you an opportunity to have an attorney every time you come out here. Do you want an attorney? No, I don't want an attorney. Fine. But don't then say in the next breath, Judge, I want you to be my attorney because that's essentially what you're saying."

Defendant responded that he did not want the court to be his attorney.

¶ 9 At a January 5, 2012, hearing, defendant stated that he was not ready to proceed on his motion to suppress statements because he did not have "enough information to completely understand exactly how to prove the prosecution's—how the prosecution's misconduct affected the Grand Jury and exactly what makes the level of deprivation and what determines probable cause pertaining to the provision in the statute." The court responded

> "Let me ask you this, [defendant]—and I ask you this almost every hearing but not every hearing, but I'm going to ask it again this hearing—as we are proceeding further and further along in this case, I think you're seeing that these are some complex issues. Do you want an attorney or not?"

Defendant initially expressed reservation about requesting counsel and noted that he and Loeffel had several conflicts about what motions to file. The court explained that conflicts would arise, and if defendant felt that his appointed attorney was providing ineffective assistance he could raise the issue on appeal. After hearing the court's explanation, defendant asked to have counsel appointed. Thereafter, public defender Kevin Lowe was appointed to represent defendant.

¶ 10 In an *ex parte* letter to the court, dated February 16, 2012, defendant complained about Lowe's representation. Defendant alleged that the letter represented his second request to have Lowe removed as his appointed counsel. Defendant further alleged that Lowe did not have time to meet with defendant because of Lowe's caseload. Defendant stated that Lowe had a preexisting bias that rendered Lowe ineffective. Defendant characterized Lowe's representation as farcical.

¶ 11 On March 26, 2012, Lowe told the court that defendant was dissatisfied with his representation. Lowe stated that defendant had filed a complaint with the Attorney Registration and Disciplinary Commission (ARDC). The ARDC concluded that defendant's complaints did not warrant an investigation. Lowe also had received a letter from defendant in which defendant expressed his dissatisfaction with Lowe's representation and addressed Lowe "in some rather unkind terms." Defendant said that he was dissatisfied with Lowe's representation and expressed frustration that he continued to receive poor representation from court-appointed attorneys. Defendant alleged that Lowe had not examined the record or consulted with him. Lowe explained that initially he was unable to spend a large amount of time on defendant's case because he had three pending jury trials. Defendant responded "I don't know what's going to become of this," and the following colloquy occurred.

"THE COURT: You know what, you're just going to represent yourself. We've gone down this road. You've exhausted my patience. You have exhausted my patience. I don't think you ever want to go to trial. I think you want to stay right where you're at.

THE DEFENDANT: What I want to do, your Honor, I want to present my motion. And the way I need to present my motion, if I have to do it, then I have to subpoena Mr. Steven Pattelli.

THE COURT: Well, Mr. Lowe and Mr. Loeffel and anybody else in the Public Defender's office doesn't get paid enough to [be] told what a lousy job they're doing for you.

THE DEFENDANT: Even if they doing a lousy job?

THE COURT: Well, you know what, after two, I'm starting to think maybe it's [defendant] and not Mr. Lowe or Mr. Loeffel because I see them all the time. I'm not supposed to consider this. I see how they do their job all the time in here. I'm not supposed to consider that, but I don't see the low caliber—that doesn't mean that they might have a bad day or might have a bad case. But I'm starting to think that it's [defendant] that has the bad case. That's what I'm starting to think.

So, you know what, you're not, if you want to get somebody from your own corporate legal department to represent you, you can. If you want to have your buddy out at the jail tell you what to do, you can, but we're not doing this anymore. We're not doin' it anymore. You're representing yourself. Got it?

THE DEFENDANT: That's fine.

THE COURT: Okay. Because they don't have to put up with what you're dishin'.

THE DEFENDANT: You've made your point clear.

THE COURT: Good.

THE DEFENDANT: Now, I need some papers to subpoena Steven Pattelli.

THE COURT: We've done all that, and I'm not giving you any more papers to subpoena. I'm not giving you standby counsel. You're set for trial—I think a week from today you're set for trial. I think it's a week from today. Good luck."

¶ 12 At an April 2, 2012, hearing, defendant said that he was not ready for trial because he needed representation. Defendant further stated that he was not hiring private counsel. The court responded:

"THE COURT: Okay. Let me make something clear about the ruling that I made. I want the record to be clear. I think you've forfeited your right to have an attorney represent you by the way you were treating your attorney, okay? So that's why I didn't go through a bunch of admonitions with you, which I've gone through those admonitions with you in the past, because we keep going back and forth, back and forth, back and forth, and we're not going to do it anymore. And when you filed your A.R.D.C. complaint against I think it was Mr. Loeffel this time—I can't remember.

[THE STATE]: Mr. Lowe.

THE COURT: Mr. Lowe, I think you've forfeited your right to be represented by a public defender. Now, if you want to—if you want to represent—if you want to hire your own attorney, go right ahead, but I'm not appointing any more. I'm just not.

THE DEFENDANT: I mean, if you force me to go *pro se*, then that's—

THE COURT: I'm not forcing you. You made that choice, but go ahead.

THE DEFENDANT: I was—I was—the last time I was here, I told you that Kevin Lowe was being ineffective, and he tole [*sic*] me—he told you himself that the situation by my writing the A.R.D.C. put him in an awkward situation, and that was either he's going to be hostile toward me or he's going to be vindictive towards me.

[THE STATE]: Your Honor—

THE DEFENDANT: And therefore—

[THE STATE]: I'm going to object to him saying that. It's not—

THE DEFENDANT: And therefore—and therefore, he's unreliable. Now, to give me partial representation—you know what I'm saying—is a violation of my constitutional rights. So therefore, I'm asking you that—I'm telling you that I'm not qualified to represent myself, and I need representation.

THE COURT: Okay. Well, there's been a long history about this. We're not going to regurgitate it every time you come out. And it didn't start with the last hearing. It started with other attorneys, and you wanted to represent yourself *pro se*. You're going to keep going through the list until you find somebody that

will agree with you, and I don't know that you're going to find somebody that agrees with you. But I can tell you right now, I'm not appointing anybody else.

So when are we going to—when are we going to try this case?

THE DEFENDANT: I mean, that's for you to decide, Your Honor."

The court set the case for trial, and defendant said that he intended to file a motion to change venue because he felt that the court was prejudiced against him. Defendant's motion for substitution of judge was heard by Judge Timothy Lucas and denied.

¶ 13 On July 2, 2012, the case was called for trial setting. Defendant said that he had no idea what trial date he wanted and that he needed appointed counsel. The court responded that it had already been through that issue, noting that it thought defendant had been through "four, five, six public defenders." To the court's disbelief, defendant responded that he had two prior public defenders. The court explained that it would consider appointing counsel for defendant and continued the case.

¶ 14 On July 13, 2012, the court said that it had reviewed the transcripts and it had decided not to appoint standby counsel for defendant. Defendant responded that he was not seeking standby counsel, but appointed counsel as he did not feel qualified to represent himself. The court denied defendant's request and defendant asked if the court was denying his sixth amendment right to counsel. The court responded that it was not appointing counsel.

¶ 15 On July 30, 2012, the case was called for a trial scheduling conference. The court advised defendant that it was not appointing counsel because defendant had "made a mockery out of this whole process." The court thought that defendant was intentionally trying to delay the proceeding by repeatedly requesting counsel and then seeking the appointment of different counsel. Near the end of the hearing the following exchange occurred.

"THE DEFENDANT: And I have been denied counsel?

THE COURT: Yes, you have been. You have been denied as clear as can be as I'm saying it. You're going it alone.

THE DEFENDANT: Okay. So, like—so when it's time to pick the jury—

THE COURT: I'm actually going to consider standby counsel.

THE DEFENDANT: Only then?

THE COURT: For jury selection."

¶ 16 On August 15, 2012, defendant entered a fully negotiated guilty plea to one count of armed robbery. In exchange for his plea, the court accepted the State's recommendation to dismiss the remaining two charges and impose a sentence of 32 years' imprisonment.

¶ 17 On August 27, 2012, defendant filed a motion to withdraw his guilty plea, and the court appointed counsel to represent defendant. After discussing the motion with defendant, appointed counsel moved to withdraw the motion. The court granted the motion to withdraw defendant's motion to withdraw the guilty plea. Defendant did not file a direct appeal.

¶ 18 On August 3, 2015, defendant filed a *pro se* postconviction petition. In the petition, defendant argued that the court had denied his sixth amendment right to appointed counsel. The court summarily dismissed the petition finding that defendant's claims were contradicted by the record. Defendant appeals.

¶ 19 ANALYSIS

¶ 20 Defendant argues that the court erred in dismissing his *pro se* postconviction petition because it established the gist of a claim that defendant was denied his constitutional right to counsel during plea negotiations and entry of the guilty plea. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a three-stage proceeding in which a

criminal defendant can assert that his conviction was the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act contemplates that the majority of postconviction petitions are drafted by *pro se* defendants. *Id.* Therefore, the threshold for a petition to survive the first stage is low. *Id.* At this stage, the court must accept as true and liberally construe all of the allegations in the petition. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, a defendant need only allege sufficient facts to state the "gist" of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. That is, the petition must assert " 'legal points arguable on their merits.' " *Id.* at 11 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). The circuit court may summarily dismiss a first-stage petition as frivolous or patently without merit where it has no arguable basis in law or fact. *Id.* at 16. Meritless legal theories include those that are completely contradicted by the record. *Id.* at 17.

¶ 21 Defendant argues that his petition stated the gist of a claim that the court denied his sixth amendment right to counsel during pretrial proceedings and the plea hearing. The sixth amendment entitles a criminal defendant to counsel at all critical stages of the prosecution. *People v. Vernón*, 396 Ill. App. 3d 145, 153 (2009) (citing *People v. Allen*, 220 Ill. App. 3d 772, 781 (1991), and *United States v. Gouveia*, 467 U.S. 180 (1984)). This right extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). However, a defendant can expressly waive his right to counsel and proceed *pro se* during these proceedings. *People v. Lesley*, 2017 IL App (3d) 140793, ¶ 17. A defendant may also relinquish his right by forfeiture or waiver by conduct. *Id.* (citing *People v. Ames*, 2012 IL App (4th) 110513, ¶ 26).

¶ 22 Forfeiture of a defendant's right to counsel results from a defendant's severe misconduct and requires no prior warning. *Ames*, 2012 IL App (4th) 110513, ¶ 37. "A trial court has the

discretion to determine that the defendant's misconduct was so severe (such as physically attacking his defense counsel) that no warning of forfeiture of counsel [is] necessary or foreseeable before the court concludes that the defendant has forfeited his right to counsel." *Id.* " '[F]orfeiture [of counsel] is reserved for the most severe cases of misconduct and should result only when less restrictive measures are inappropriate.' " *Lesley*, 2017 IL App (3d) 140793, ¶ 18 (quoting *Arizona v. Hampton*, 92 P.3d 871, 874 (2004) (*en banc*).

¶ 23 A defendant waives his right to counsel as a result of less severe forms of misconduct that persist after the court's warning to defendant that continued misconduct will result in the loss of his right to appointed counsel. *Id.* ¶ 19. After the court's warning, a defendant's engagement in dilatory tactics " ' "may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." ' " *Id.* (quoting *Ames*, 2012 IL App (4th) 110513, ¶ 34, quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995)). Before a defendant's misconduct can result in waiver of counsel, the circuit court must comply with the admonishment requirements of Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

¶ 24 We are not concerned with whether the facts affirmatively establish that defendant's conduct resulted in forfeiture or waiver of counsel. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22 (court is not allowed to engage in any fact finding at first stage). At the first stage, this court is only concerned with whether the petition lacks an arguable basis in law and fact. *Id.* In his petition, defendant alleged that he was denied his sixth amendment right to counsel when the court refused to appoint counsel after defendant's second election to proceed *pro se*. Specifically, the petition calls attention to the following statement made by the court after Lowe's withdrawal: "Well, Mr. Lowe and Mr. Loeffel and anybody else in the Public Defender's office doesn't get paid enough to [be] told what a lousy job they're doing for you." *Supra* ¶ 11. The petition also

notes that "I think you've forfeited your right to have an attorney represent you by the way you were treating your attorney, okay?" *Supra* ¶ 12. These allegations raise a claim that it is at least arguable that the court deprived defendant of his right to counsel.

¶ 25 At the outset, we note that an individual's complaints about his attorneys' representation should not be classified as "misconduct" in the legal sense. Such an interpretation chills an individual's right to effective assistance of appointed counsel. As a result, our review of defendant's conduct in the instant case is limited to defendant's *allegedly* derogatory letter to Lowe and defendant's use of alternating requests to proceed *pro se*. The relevant question before us is whether defendant's petition made a sufficient showing (gist) that such conduct did not rise to the level of misconduct, resulting in his forfeiture or waiver of counsel.

¶ 26 The record does not affirmatively establish that defendant forfeited his right to counsel as a result of severe misconduct; or alternatively, waived his right to counsel by engaging in less-severe misconduct. Forfeiture is reserved for the most severe misconduct. *Lesley*, 2017 IL App (3d) 140793, ¶ 18. Alternatively, waiver will be found where the record establishes that a defendant engaged in dilatory tactics, which constitute an implicit request to proceed without counsel. *Id.* ¶ 19. It is highly questionable whether defendant's letter to Lowe, and defendant's use of alternating requests to proceed *pro se*, constitute misconduct of such a severe nature so as to justify his forfeiture of appointed counsel. Likewise, there is a question of fact as to whether defendant's letter to Lowe, and defendant's use of alternating requests to proceed *pro se*, establish misconduct in the sense that defendant was attempting to intentionally delay the proceedings. Thus, at this stage, defendant has alleged the gist of a claim that he did not forfeit or waive his right to counsel due to misconduct. Accordingly, defendant's claim that he was denied his right to counsel must proceed to the second stage.

¶ 27 Finally, even if we found that the record conclusively established that defendant engaged in misconduct thereby resulting in his waiver of counsel, the record does not clearly indicate that the circuit court provided the necessary warnings before it denied defendant's right to counsel. The State contends that the court's earlier Rule 401 admonitions satisfy the waiver by conduct warning requirement. However, this presents a question of law as to whether the earlier admonition, which was provided when defendant *voluntarily* elected to proceed *pro se*, carries through to the proceedings where the court denied defendant's right to counsel. The record clearly establishes that defendant did not receive a subsequent admonishment or warning near the time that the court denied his right to counsel. *Supra* ¶ 12. If the earlier admonitions were legally insufficient or did not carry through to the later proceeding, the court's subsequent denial of counsel was likewise improper. In light of these legal and factual issues, we reject the court's holding that the record expressly contradicts defendant's postconviction petition. We find that defendant's *pro se* petition established the gist of a claim, which warrants second-stage proceedings.

¶ 28 CONCLUSION

¶ 29 This order does not address any other alternative argument contained in defendant's *pro se* postconviction petition. As defendant has stated the gist of at least one constitutional claim, the entire petition may proceed to the second stage of postconviction proceedings. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). Accordingly, the judgment of the circuit court of Peoria County is reversed and remanded for second-stage postconviction proceedings.

¶ 30 Reversed and remanded.