No. 122100

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-14-0793
Respondent-Appellant,	)
v.	) There on Appeal from the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois, No. 12-CF-86
MYRON T. LESLEY,	)
Petitioner-Appellee.	) The Honorable Cynthia Raccuglia, Judge Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

KATHERINE M. DOERSCH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-6128
kdoersch@atg.state.il.us

Counsel for Respondent-Appellant People of the State of Illinois

E-FILED
1/8/2018 2:36 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

The People appeal from the judgment of the Illinois Appellate Court, Third District, which reversed and remanded for appointment of counsel and new second-stage postconviction proceedings, holding that the circuit court was "required to warn [petitioner] that his continued misconduct could result in waiver of his statutory right to counsel before [petitioner] could waive his right to counsel by conduct." *People v. Lesley*, 2017 IL App (3d) 140793, ¶ 22. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner forfeited his statutory right to postconviction counsel due to his misconduct.

2. Alternatively, whether petitioner waived his statutory right to postconviction counsel by his conduct.

STANDARD OF REVIEW

This Court has not explicitly invoked a particular standard of review applicable to a defendant's waiver of the right to counsel. This Court should follow *People v. Kidd*, 178 Ill. 2d 92 (1997), and uphold the trial court's factual findings unless they are against manifest weight of evidence, and review de novo the ultimate legal question of whether petitioner waived or forfeited his right to counsel.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612(b) & 651. This Court allowed the People's petition for leave to appeal on September 27, 2017.

STATEMENT OF FACTS

Petitioner pleads guilty to drug charges.

In February 2012, petitioner (born 12/28/71, R114) was charged with unlawful possession of a controlled substance (cocaine) with intent to deliver and unlawful delivery of a controlled substance (cocaine). C1-2. Petitioner was released on $100,000 bond. *See* R3. Later that same month, petitioner was charged with drug offenses in a superseding four-count indictment. C14-17.[1]

At a May 10, 2012 hearing, Assistant Public Defender (APD) James Reilly informed the court that petitioner intended to seek private counsel and the court continued the matter for petitioner's appearance with counsel. R15-16. At the next hearing approximately three weeks later, petitioner still had not retained private counsel. R20. At the July 2012 final pretrial, Reilly sought a continuance of the scheduled July 16, 2012 trial date, noting that deaths in petitioner's family had prevented him from securing private

[1] Ct. I: unlawful possession of a controlled substance (more than one gram but less than fifteen grams of a substance containing cocaine) with intent to deliver; Ct. II: unlawful delivery of a controlled substance (less than one gram of a substance containing cocaine); Ct. III: unlawful delivery of a controlled substance (more than one gram but less than fifteen grams of a substance containing cocaine); Ct. IV: unlawful delivery of a controlled substance (less than one gram of a substance containing cocaine).

counsel. R24. Petitioner told the court that he was trying to hire an attorney named Kulek, and the court continued the matter for two more weeks, R25, and then again for an additional week, R31. On August 9, 2012, the prosecutor advised the court that Kulek would not be representing petitioner, but that attorney Douglas Olivero would be entering an appearance for petitioner. R35. The court gave petitioner one more week to appear with retained counsel, noting that if Olivero did not enter his appearance, the court would set the matter for trial. R36.

At the August 16, 2012 hearing, the Public Defender was permitted to withdraw, and Olivero entered his appearance. C31-32; R40. Olivero appeared at several subsequent status hearings. But petitioner failed to appear for a 9:00 a.m. hearing on December 20, 2012, and Olivero moved to withdraw, citing petitioner's refusal to cooperate. C37, 39; *see also* R56 (Olivero, noting that defendant has "failed to come see me"). The court issued a warrant for petitioner's arrest and set bond at $2,000,000. R57.

Petitioner eventually appeared in court around 1:00 p.m., claiming to have overslept. R58. Olivero advised the court that petitioner had no objection to his withdrawal, and petitioner told the court that he intended to "get somebody else." R59. After admonishing petitioner to appear on time, the court continued the case to January 10, 2013 for status. *Id.* Before recalling the warrant, the judge reminded petitioner that she was "not going to tolerate continuances." R60. On the January 10 status date, Olivero

informed the court that petitioner had recently been released from the hospital and needed additional time to find new counsel; the court granted him two weeks "and that's it." R64.

On January 24, 2013, petitioner again failed to appear. R68. The prosecutor had heard that petitioner was in the hospital but "had no proof of that" and asked for "a warrant in the amount of one million dollars, 10 percent to apply." *Id*. The court issued the warrant. R69. Following a recess, petitioner finally appeared in court. R70. After reviewing a report from the hospital, the judge stated that it was "very clear" that petitioner went to the hospital "just to get away from this." R71. Accordingly, the court ordered that petitioner be taken into custody on the warrant. R73.

At a January 25, 2013 hearing, the judge again stated that she did not believe that petitioner had been so ill that he could not appear, but that she would release him on his "regular bond." R80-82. The court granted Olivero's motion to withdraw and appointed the Public Defender, and APD Michael Olewinski appeared on petitioner's behalf. Olewinski appeared at a January 31, 2013 status hearing, R84, and again on April 11, 2013, when he noted that petitioner "still has to come in and speak to our office." R88; C47-51. The court admonished petitioner, "please help them prepare for you so make sure you go in and see them." *Id*.

In April 2013, while free on bond, petitioner was arrested and charged with two additional counts of unlawful delivery of a controlled substance

containing cocaine, C64-65; C72-73; R91, and bond was set at $2,000,000, R99. Petitioner was arraigned on the new counts on May 2, 2013. R104.

In June 2013, petitioner pleaded guilty to counts I and VI in exchange for consecutive sentences totaling eleven years and dismissal of counts II-V. C80 (sentencing judgment); R112-13 (terms of plea agreement).

Following a third-stage evidentiary hearing, the circuit court denies postconviction relief.

In September 2013, petitioner filed a pro se postconviction petition asserting that Olewinski "failed to undertake or conduct an independent investigation into what really happened concerning the 2 drug charges" and "failed to investigate the factual basis for the arrest and if the plea bargain validity (*sic*)," C94, and that no justification was given for his consecutive sentences, C95. The People moved to dismiss the petition, C105, and at petitioner's request, the judge appointed the Public Defender to represent him, C109; R128.

On November 8, 2013, LaSalle County Public Defender Timothy Cappellini filed his appearance. C112. On the next court date, November 21, 2013, petitioner appeared with Cappellini, who stated that he had copies of the plea transcript and the State's motion to dismiss, and suggested a twenty-day continuance. R133. Petitioner requested "a long continuance," R133, explaining that he and Cappellini had a disagreement:

> Petitioner: Well, me and him just had words back there, your Honor. He told me he ain't representing me. He told me to go pro se. That's what he just told me.

Cappellini: I said if he doesn't want me to represent him - -

Petitioner: What did he say? Did he say that?

Cappellini: -- he can go pro se.

Petitioner: Me and him are having a conflict already, your Honor. I asked him back there, I said, I need my transcripts. He told me no. He – I got to go through him to get the transcripts. I told - -

Court: You do.

Petitioner: Okay. I knew that but I got the paper back. I'm entitled to get the transcripts. He told me to go pro se and do it myself.

Court: Well, he –

Cappellini: That's not true.

Court: Well, it doesn't –

Cappellini: I said if he doesn't want me to represent him, he can go pro se. Otherwise, I will acquire the transcripts, I will review 'em and I will be the attorney.

Court: He wants to be the attorney.

Petitioner: Yes.

Court: So we are going to do 20 days. That's what he's telling you on the record. He's telling you that. And he wants to get everything for you. That's the only way he - -

Petitioner: He's doing that in front of you, your Honor, because he did not say that back there.

Court: Don't interrupt me, Mr. Lesley. Please. I don't interrupt you.

Petitioner: Yes, ma'am.

> Court: Now, you really need to listen to me because I'm the only one impartial here. Everybody else has an agenda and a position. I don't. My job is to protect everybody's rights.
>
> Whatever he said to you he's right about one thing. He can easily and much easier than you get the transcripts and really, Mr. Lesley, that's what you need for your - -
>
> Petitioner: Yes, ma'am.
>
> Court: -- for your petition. He can get them.
>
> Petitioner: Yes, ma'am.
>
> Court: And I'll make sure he gets them.
>
> Petitioner: So actually, your Honor, he told me to go pro se.
>
> Court: All right. Well, he can get them and we're not going to go through that again. . . .

R134-35. Cappellini proposed that the court set the matter for status on December 19, so he could "sit down [with petitioner] and go through all his issues with him." R136.

Petitioner then returned to the topic of his dissatisfaction with Cappellini:

> Petitioner: See what I'm saying, your Honor?
>
> Cappellini: He wanted to call Ed Kulek. I said please do. He's a fine lawyer.
>
> Court: You know, stop it. First of all, you're going to argue. That's what lawyers and a client does but I mean if you told him that you're going to call Ed Kulek - -
>
> Petitioner: No, your Honor, the thing - -
>
> Court: - - what did you expect his response to be?

> Petitioner: The thing was when he came to the bench, he told me to go pro se. He's the one that drove me out. He came back there with attitude.
>
> Cappellini: That's not true.
>
> Court: Everybody - -
>
> Cappellini: Judge, let me interrupt here. If the defendant is not going to listen to anything I tell him when I try to explain the law and he's going to tell me I'm wrong, I said, you can go pro se. You can get the transcripts and you can do that or else I represent you as an attorney and I have to follow the law. That's all there is to it.
>
> Court: And what's wrong with that, Mr. Lesley?
>
> Petitioner: Nothing.
>
> Court: That is true. *I mean if you want a - - if you're not going to listen to him, then you have to tell me you want to go pro se. If you want to call Mr. Kulek, you can do what you want* but the point is whoever represents you is going to tell you that. That you have to listen to them. So I'll see you then and see what the status is on December 19, sir.

R136-37 (emphasis added).

APD Douglas Kramarsic appeared with petitioner at the December 19, 2013 status hearing and advised the court that he had spoken with petitioner and provided him with a copy of the plea proceedings and applicable sentencing provisions[2]; he asked the court to set the matter for a further status hearing. R140.

---

[2] 730 ILCS 5/5-8-4(d)(8) provides that "If a person charged with a felony commits a separate felony while on pretrial release . . . , then the sentences imposed upon conviction of these felonies shall be served consecutively[.]"

Cappellini appeared at the January 9, 2014 status hearing. R144. Cappellini told the court that he had "discussed or attempted to discuss with [petitioner] what his disagreements were with [plea counsel]." R145. Any question of whether petitioner was told that he was eligible for an extended term sentence was resolved by reference to the transcript of the plea hearing. *Id*. And Cappellini had shared with petitioner a copy of the lab report related to count VI. *Id*. Responding to petitioner's complaint that plea counsel did not do certain research, Cappellini said that he had read plea counsel's file; he concluded by stating that he would "be able to put something down and we can set it." R146.

At the February 2014 hearing, petitioner wore shackles because he had argued with Kramarsic. R151. Kramarsic told the judge that he had met with petitioner with the intention of discussing the deficiencies in the pro se postconviction petition, but "the conversation did not get to that point." R152. Petitioner became "very belligerent" and told Kramarsic numerous times, "go fuck yourself." *Id*. Petitioner told Kramarsic that he was fired and that petitioner wanted to hire his own lawyer. Then, "in a physical and aggressive manner," petitioner grabbed the papers out of Kramarsic's hands while yelling obscenities. *Id*. Kramarsic told the judge that "it's clear that Mr. Lesley does not wish to continue with me as his attorney, and I'll leave it to the Court's discretion as to what should take place next." *Id*.

The judge admonished petitioner that he could not choose his appointed counsel. R153. Petitioner complained that Kramarsic "tried to treat [him] like [he was] stupid or something"; petitioner was "trying to show him something and he's ignoring it and I'm yelling at him, I don't think he's trying to help me, he's trying to hurt me." *Id.* Petitioner stated that given a sixty-day continuance, he believed that he could hire private counsel. *Id.*

Court: You want to hire an attorney?

Petitioner: Yes, ma'am.

Court: All right, then I will do that for you because I can see there was developing problems even before today.

Petitioner: Yes, ma'am.

Court: *I can't give you another Public Defender but I can certainly let you hire somebody.*

Petitioner: Yes, ma'am.

Court: So I'll do that.

Petitioner: Yes, ma'am, I appreciate that.

Court: I'll give you 60 days to try to hire an attorney.

Petitioner: Thank you.

Court: That would be good for you.

Petitioner: Thank you, ma'am. I appreciate that. I'll be glad to do that. Thank you.

Court: *I just can't give you another Public Defender, but I'd be glad to let you hire someone.*

R154 (emphasis added). Kramarsic stated his understanding that petitioner and Cappellini had "some issues," and informed the court that this was now his case; he had reviewed "everything involved in this case," but he had not filed his Rule 651(c) certification because he could not "even get to the point of being able to do that." R155. The court replied that Kramarsic would not be required to do anything until they learned whether petitioner would be able to retain counsel. *Id*.

The case came on for status on April 24, 2014. R160. Kramarsic told the court that having again tried to discuss the matter with petitioner that morning, it was "one hundred percent absolutely clear" that petitioner did not want him on the case. *Id*. Petitioner stated that he was trying to find a lawyer but had not yet hired one. The judge was aware that petitioner "won't talk to" Kramarsic, and accordingly ruled that Kramarsic "won't be representing him at any hearing at this point." The court set the matter for a hearing on the State's motion to dismiss and noted that if petitioner did not retain a lawyer by that time, "I'll have to address him as to his options." R161. The judge did not dismiss Kramarsic "completely," but stated that he was not expected to be prepared for a hearing. *Id*.

At the outset of the June 2014 court date, the following colloquy occurred:

> Court: Now, Mr. Lesley, it's my understanding that you still want to proceed pro se, to represent yourself?
>
> Petitioner: I'm going to have to, Your Honor, yes, ma'am.

Court: Why are you going to have to?

Petitioner: I asked [Kramarsic] three times back there are you going to help me and he gave me no answer.

Court: Now, when you say, is he going to help you, what do you mean by that? I need to investigate this issue.

Petitioner: That's what I'm saying, is he going to help me try to get through this post-conviction?

Court: Well, he has so far, has he not? Mr. Kramarsic?

Petitioner: He hasn't filed no motion or nothing.

Court: You need to address this issue because when there's a complaint, you know, we need to have an answer here.

Kramarsic: Your Honor, - -

Court: It's not just - - he's complaining not just that he wants to represent himself but he says that you said you're not going to help him so why don't you respond.

Kramarsic: Your Honor, I have. This is the third time I've attempted to talk to him about this case. First time that I met with him he did not agree with the - - with my ideas with the case and the way I wanted to proceed and I told him I didn't believe the issues here - - that we had strong issues, and he wanted to proceed with what he thought was the right way to do it and not even listen to the way I wanted to proceed with the case. That was the first time.

The second time I met with him again I tried again to explain what I felt about the case. Again, he disagreed with me. That was the time that he lunged at me and swore at me and told me to leave, and certainly I could tell at that point that obviously he does not want me to help him at all. He just doesn't agree with my theory of the case and clearly does not want me involved with it and I feel like I'm stuck here because I don't know what else to do. He's told me numerous times he does not want me to do anything.

Court: All right, well, *I find, knowing Mr. Lesley, and considering the issues involved here, that it appears that you do not want to listen to Mr. Kramarsic*.

Now the question - - I will allow - - *you can't choose what Public Defender you're going to have so I'll allow the Public Defender to withdraw*.

Now, the question then becomes, Mr. Lesley, the only right to a lawyer that you have - - I feel you are capable of representing yourself if that is your desire, is whether you want to hire private counsel or you want to represent yourself pro se.

That's the first question I have of you. What is your answer?

Petitioner: I was trying to hire private counsel, Your Honor, you know what I'm saying, but finally no funding. But, you know, I have to do something, I can't - - first of all, I never lunged at him. And I got into it with Mr. Cappellini first. It wasn't him, see, that's why he just told a story, it wasn't him. Me and Cappellini had a few years. And I asked with a lot of people around, would you help me and what did he tell me? He told me no, sir. And today when I asked him he didn't say nothing. Are you going to help me? Like what he's doing now, walking out.

Court: So having said that then I will - - do you want to represent yourself?

Petitioner: No, I can't represent myself.

Court: Well, you're going to have to.

Petitioner: All right, let's go.

Court: When you say you can't - - are you telling me that you are not going to be able to hire private counsel?

Petitioner: I'm waiting on my parents. I'm waiting on my parents.

R166-70 (emphasis added).

Asked whether he was ready to proceed, petitioner responded, "I got no attorney. I guess not." R170. The court permitted petitioner to file additional pleadings arguing that counts V and VI should not have been filed under the same case number as counts I – IV, C119-120, and continued the matter for thirty-five days for petitioner to retain counsel. R171. The court admonished petitioner that at the next hearing he should be prepared "either on [his] own or with a lawyer" to proceed on the State's motion to dismiss. R172; *see also* C122 ("P.D. allowed to W/D.").

The parties appeared in court in July 2014 for argument on the State's motion to dismiss; petitioner appeared pro se and answered that he was ready to proceed. R177. Following argument, the trial court granted the motion in part and ordered a third-stage evidentiary hearing limited to petitioner's allegation that plea counsel failed to investigate the case. C123; R183. At the conclusion of the proceedings, the judge asked petitioner, "You still want to represent yourself, obviously?" Petitioner replied, "Pretty much." R183. The Court inquired, "Is that true?" and petitioner answered, "Yes, ma'am. But I need to go back to my prison and do the research." R183-84. Petitioner asked for "a long court date," and the court granted his request for "at least 60 days." R185. The court directed the prosecutor to make sure that Olewinski was available for the evidentiary hearing, R185, and advised petitioner that he could question Olewinski and testify himself if he wanted, and that he should bring with him "any law" that he had, R186.

The court conducted the evidentiary hearing in October 2014. At that time, petitioner filed a "motion to supplement the record to the post-conviction." R193; C127-33. Petitioner called plea counsel, Olewinski, who testified that he had no basis to attack the lab report. R217, 211. Additionally, petitioner said that he wanted to plead guilty because he "wanted to get it done and get it over with" and had no dispute with the testing. *Id.* On cross-examination, Olewinski stated that he spoke with petitioner and they discussed his options, the penalties he was facing, the State's offer, and the strength of the State's case. R241. Petitioner responded that if he could get the deal he wanted, he wanted to plead guilty that day. Olewinski negotiated with the State, and petitioner said that he wanted to accept the offer; Olewinski did not pressure petitioner into taking the deal. R241-42.

Following argument by the parties, the court denied the petition. C126; R250-51.

The Third District Reverses.

Petitioner appealed, arguing that the circuit court had erred in forcing him to represent himself. *Lesley*, 2017 IL App (3d) 140793, ¶ 16. After explaining that a defendant may lose his right to counsel by (1) express waiver, (2) forfeiture, or (3) waiver by conduct, *id.* ¶¶ 17-19, the appellate court held that "the court erred by permitting [postconviction counsel] to withdraw before warning [petitioner] that he stood to lose his right to

appointed counsel if his behavior continued," *id*. ¶ 23. The appellate court also declined to find that petitioner forfeited his right to counsel, stating that petitioner's "misconduct was [not] so severe that no warning was necessary or foreseeable," and that "[w]hile the trial court has discretion to determine whether the severity of a defendant's misconduct requires forfeiture, under these facts, a warning would have been the appropriate remedy." *Id*. ¶ 25.

Justice Schmidt dissented, noting that "this trial judge was more than patient and that [petitioner] was well aware that his refusal to work with the public defender would leave him with two choices: hire private counsel or proceed pro se." *Id*. ¶ 32. Justice Schmidt found that "as early as February 20, 2014, the trial court was putting [petitioner] on notice that if he could not get along with the public defender, then he would either have to hire private counsel or represent himself," and that "[i]f it was not clear then, it certainly should have been clear on April 24, 2014," when the court acknowledged that it was clear that petitioner wanted nothing to do with the public defender and petitioner advised that he was trying to find another attorney but had not yet hired one. *Id*. ¶¶ 34-35. "It is hard to understand how anyone in the courtroom that day could not understand that the options were to get along and cooperate with the public defender, hire your own counsel, or proceed pro se." *Id*. ¶ 35. And "[t]o the extent that Rule 401 admonishments are required in postconviction proceedings," he concluded, "there was substantial compliance." *Id*.

ARGUMENT

As a result of his actions, petitioner lost his statutory right to postconviction counsel, by forfeiture and, in the alternative, waiver by conduct. In concluding that petitioner did not forfeit his right to counsel, the appellate court failed to consider that petitioner's right to counsel was a statutory right afforded by the Post-Conviction Hearing Act and that the concerns that apply to waivers of the constitutional right to counsel at trial and other critical stages do not apply with equal force to the statutory right to counsel on collateral review. In rejecting a waiver by conduct, the appellate court wrongly found that petitioner was not warned that he stood to lose his right to appointed counsel if his behavior continued. To the contrary, the record amply establishes that petitioner was admonished and aware that if he could not get along with the public defender, then he would either have to hire private counsel or represent himself. Accordingly, this Court should reverse.

I. Waiver, Forfeiture, and Waiver of Counsel by Conduct

Like many other state and federal jurisdictions, the Illinois Appellate Court has held that a defendant may relinquish his right to counsel in three ways: express waiver, waiver by conduct, and forfeiture. *People v. Ames*, 2012 IL App (4th) 110513, ¶ 26 (citing *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009); *State v. Pedockie*, 137 P.3d 716, 721 (Utah 2006); *United States v. Goldberg*, 67 F.3d 1092, 1099–1101 (3d Cir. 1995)).

Waiver

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *People v. Kidd*, 178 Ill. 2d 92, 104 (1997). "Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'" *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). A waiver of counsel is intelligent when the defendant "knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused." *People v. Lego*, 168 Ill. 2d 561, 565 (1995).

In addition to this constitutionally grounded protection, Supreme Court Rule 401(a) provides that "[a]ny waiver of counsel shall be in open court," that the court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first addressing the defendant personally in open court, informing him of and determining that he understands" the nature of the charge, the minimum and maximum sentence, and "that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."

Rule 401 applies where the right to counsel arises from section 113-3(b) of the Code of Criminal Procedure, 725 ILCS 5/113–3(b). *People v. Campbell*, 224 Ill. 2d 80, 85-86 (2006). But the Appellate Court has held that Rule 401 does not apply at the post-trial and post-sentencing stages, for by that stage of the proceedings, the defendant "already knew everything a Rule 401(a) admonishment would have told him"; the "plain language and logic of Rule 401(a) does not require admonishing a defendant who has been convicted and sentenced of the nature of the charge for which he was just convicted and the sentence he just received." *People v. Young*, 341 Ill. App. 3d 379, 386-87 (4th Dist. 2003).

Forfeiture

Although it appears to be a question of first impression before this Court, many state and federal courts, including the Illinois Appellate Court, have held that a defendant may forfeit his right to counsel. *See People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005) (forfeiture defined as failure to make timely assertion of a right). Unlike waiver, "forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg*, 67 F.3d at 1100; *Ames*, 2012 IL App (4th) 110513, ¶ 32; *but see United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015) ("we have never held that counsel can be relinquished by means short of waiver"). A defendant can forfeit his right to counsel "by virtue of his pervasive misconduct." *United States v.*

McLeod, 53 F.3d 322, 325 (11th Cir. 1995). Courts surveying the relevant case law have noted that "[f]actors relevant to the trial court's consideration include (1) whether the defendant has had more than one appointed counsel; (2) the stage of the proceedings, with forfeiture 'rarely ... applied to deny a defendant representation during trial'; (3) violence or threats of violence against appointed counsel; and (4) [whether] measures short of forfeiture have been or will be unavailing." *State v. Holmes*, 302 S.W.3d 831, 839 (Tenn. 2010) (quoting *Com. v. Means*, 907 N.E.2d 646, 659-61 (Mass. 2009)); *see State v. Nisbet*, 134 A.3d 840, 854 (Maine 2016) ("under circumstances arising from a defendant's willful and egregious conduct that undermines or exploits the right to counsel with substantial detriment to the judicial process, and where there is no meaningful available alternative, the court may determine that the accused has forfeited the right to counsel and thereby require the defendant to proceed without counsel"). *See generally* Wayne R. LaFave, et al., 3 Crim. Proc. § 11.3(c) (4th ed. 2016 update) ("What these courts have held, in effect, is that the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combined to justify a forfeiture of defendant's right to counsel[.]").

Waiver by conduct

The "hybrid situation," waiver by conduct," "combines elements of waiver and forfeiture." *Goldberg*, 67 F.3d at 1100. "A defendant can waive

his right to counsel through conduct as well as words." *United States v. Oreye*, 263 F.3d 669, 669 (7th Cir. 2001). "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel." *Goldberg*, 67 F.3d at 1100. These are not true "waiver" cases; many defendants will engage in dilatory conduct yet also vehemently object to being forced to proceed pro se. *Id*. at 1101. These defendants are "voluntarily engaging in misconduct knowing what they stand to lose," but "they are not affirmatively requesting to proceed pro se." *Id*.

II. Petitioner Forfeited His Statutory Right to the Reasonable Assistance of Counsel.

Here, petitioner forfeited his statutory right to appointed postconviction counsel due to his repeated misconduct. Petitioner argued with Cappellini about obtaining the transcripts of his plea hearing, refused to listen when Cappellini tried to explain the governing law, and told Capellini that he was wrong. R136-37. Petitioner was even more abusive of Kramarsic, cursing at him, lunging at him, and aggressively pulling papers from his hand. Kramarsic tried three times to talk with petitioner about the case; petitioner would not listen to counsel's advice and, during the second meeting, petitioner lunged and swore at counsel as he tried to explain his assessment of the case. Petitioner told Kramarsic "numerous times" that he did not want counsel to "do anything" on the case. *See* R168.

In declining to find forfeiture, the appellate court overlooked that petitioner forfeited not his constitutional right to trial counsel, but his statutory right to the reasonable assistance of counsel on collateral review. *See Lesley*, 2017 IL App (3d) 140793, ¶ 22 ("The distinction between how and where the defendants' right to counsel originated is one without significance"). Even in cases where the right to counsel derives from the Constitution, the stage of the proceedings at which the misconduct occurred is relevant to the forfeiture inquiry. For example, the Second and Third Circuits, as well as the Supreme Judicial Court of Massachusetts, have suggested that more egregious misconduct might be required to justify a forfeiture of counsel at trial. *United States v. Leggett*, 162 F.3d 237, 251 n.14 (3d Cir. 1998) (noting that "forfeiture of counsel at sentencing does not deal as serious a blow to a defendant as would the forfeiture of counsel at the trial itself"); *Gilchrist v. O'Keefe*, 260 F.3d 87, 99 (2d Cir. 2001) (affirming denial of habeas corpus relief where forfeiture occurred at sentencing and suggesting "potentially heightened burden of justification that might be associated with a denial of counsel at trial"); *Com. v. Means*, 907 N.E.2d 646, 659 (Mass. 2009) (noting that "forfeiture rarely is applied to deny a defendant representation during trial" and "more commonly invoked at other stages of a criminal matter, such as a motion for a new trial, sentencing, appeal, and pretrial proceedings").

It follows that less egregious conduct should justify forfeiture at post-trial proceedings and on collateral review, where there is no constitutional right to counsel. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review"; "[i]t is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). "[T]here is no constitutional right to assistance of counsel during postconviction proceedings." *People v. Cotto*, 2016 IL 119006, ¶ 29. "'[T]he right to assistance of counsel in postconviction proceedings is a matter of legislative grace," and a petitioner is guaranteed only the reasonable level of assistance provided by the Post-Conviction Hearing Act, *id*. (quoting *People v. Hardin*, 217 Ill. 2d 289, 299 (2005)), which is "'less than that afforded by the federal or state constitutions,'" *id*. ¶ 45 (quoting *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)). *See also* Supreme Court Rule 651(c) (postconviction counsel must (1) consult with petitioner (by mail or in person) to ascertain the contentions of deprivation of constitutional rights; (2) examine record of trial court proceedings; and (3) make any amendments to pro se petition necessary for adequate presentation of petitioner's contentions).

Moreover, "the most critical stage in the post-conviction process" is not the second or third stage (where the statutory right to counsel applies), but "the point at which the original petition, the first pleading, is considered by the post-conviction court . . . because it is at this stage of the proceedings that

the court determines whether the proceedings should go forward or end." *People v. Davis*, 156 Ill. 2d 149, 163 (1993). In short, at the postconviction stage — unlike trial, sentencing, or even a probation revocation hearing — a petitioner has already had his constitutionally guaranteed fair trial with the assistance of counsel and faces no potential loss of liberty. And this Court has explained that the second and third stages of postconviction review, where the petitioner has a statutory right to appointed counsel, are less critical than the first stage, where he does not. Accordingly, less egregious conduct should justify forfeiture of appointed counsel on collateral review.

The appellate court held that petitioner's misconduct was not sufficiently "severe" to warrant forfeiture. *Lesley*, 2017 IL App (3d) 140793, ¶ 25. But the fact that petitioner did not cause bodily injury to counsel is no bar to forfeiture. To be sure, physically attacking one's attorney plainly constitutes the sort of "extremely serious misconduct" that may warrant forfeiture, even in cases where the right to counsel derives from the Constitution rather than from rule or statute. *See*, *e.g.*, *Leggett*, 162 F.3d at 250 (forfeiture at sentencing upheld due to defendant's intentional battery of counsel); *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 was necessary or foreseeable before the court concludes that the

defendant has forfeited his right to counsel and will be required to henceforth represent himself.").

Forfeitures of the constitutional right to counsel have been upheld for misconduct well short of physical assault. "A forfeiture (or an implicit waiver) may withstand constitutional scrutiny where, for instance, a defendant repeatedly threatens harm to his lawyer and/or his lawyer's family and it is apparent that the defendant has the ability to deliver on his threats." *Holmes*, 302 S.W.3d at 848. Indeed, the Supreme Court of Tennessee affirmed a capital defendant's forfeiture of trial counsel despite the absence of a physical assault on counsel. *State v. Carruthers,* 35 S.W.3d 516, 550 (Tenn. 2000) (capital defendant's conduct "sufficiently egregious" to support forfeiture of trial counsel where, after dismissing several prior attorneys, defendant repeatedly sent threatening letters to his "third set of attorneys" and eventually extended those threats to attorney's family and office staff and accused attorney of lying and drug use in attempt to delay trial).

Many other courts have affirmed forfeitures — in cases in which the defendant had a constitutional right to counsel — in the absence of a physical attack on counsel. For example, the Eleventh Circuit held that a defendant forfeited his right to counsel where he (1) was verbally abusive and threatened his second attorney, (2) "threatened, on at least four occasions, to sue [counsel]," and (3) attempted to persuade counsel to engage in unethical

conduct in connection with the case. *McLeod*, 53 F.3d at 325. Because the defendant's "behavior toward his counsel was repeatedly abusive, threatening, and coercive," he forfeited his right to counsel at the hearing on his motion for a new trial. *Id*. at 326; *see also United States v. Thomas*, 357 F.3d 357, 363 (3d Cir. 2004) (defendant forfeited right to counsel where he threatened "physical confrontation" with counsel, was verbally abusive to counsel, tore up his correspondence, refused to cooperate in producing witness list, hung up on counsel during telephone conversation, attempted to force counsel to file several frivolous claims, and engaged in similar conduct with three prior attorneys); *Nisbet*, 134 A.3d at 855-56 (affirming forfeiture of trial counsel where defendant threatened physical harm to fourth appointed counsel, his "interest was to have legal representation in name only and . . . he himself demanded to control all manner of the defense irrespective of its objective merit or ethical propriety"); *Kostyshyn v. State*, 51 A.3d 416 (Del. 2012) (affirming forfeiture where defendant screamed "You're an idiot" at attorney during court hearing and "managed to drive off his next attorney by engaging in behavior the Superior Court judge deemed 'abusive.'"); *State v. Boyd*, 682 S.E.2d 463, 467 (N.C. App. 2009) (affirming forfeiture where "defendant willfully obstructed and delayed the trial court proceedings by refusing to cooperate with either of his appointed attorneys and insisting that his case would not be tried"); *State v. Cummings*, 546 N.W.2d 406, 419-20 (Wis. 1996) (defendant forfeited right to counsel where he "continuously

refused to cooperate with his court-appointed attorney while at the same time refused to waive his right to counsel" and dissatisfaction was "based solely upon a desire to delay").

Here, like the defendant in *Nisbet*, petitioner adamantly refused counsel's suggestions to amend the pro se petition to cure its deficiencies and refused to listen to counsel's explanation of the law and assessment of the case, effectively "demand[ing] to control all manner of the defense irrespective of its objective merit." 134 A.3d at 855-56; *see* R167 (told that counsel did not believe "that we had strong issues," petitioner wanted to do what he wanted to do and would "not even listen to" counsel's suggestions; petitioner told counsel he did not want him to "do anything" on the case). Like the defendants in *McLeod*, *Thomas*, and *Kostyshyn*, petitioner was verbally abusive, repeatedly yelling at Kramarsic, "go fuck yourself!" And though petitioner's conduct did not result in bodily injury, his conduct was like that of the defendant in *Thomas*, in that he "lunged at" counsel and pulled the papers from counsel's hands "in a physical and aggressive manner." If forfeiture for such behavior is justified in cases where the right to counsel is conferred by the Constitution, certainly it is warranted in the present matter, where the right to counsel is a matter of legislative grace. Accordingly, petitioner forfeited his right to counsel.

III. Alternatively, Petitioner Waived His Right to Counsel by His Conduct.

Alternatively, this Court should find that petitioner waived his statutory right to counsel by his conduct. *United States v. Pittman*, 816 F.3d 419 (6th Cir. 2016), is instructive. When Pittman's fourth attorney moved to withdraw, the court denied that request and admonished Pittman that "as an indigent defendant, he had a right to appointed counsel but had no right to choose which attorney would represent him." *Id*. at 422. As the Sixth Circuit explained, "[t]he stakes at that point were clear: Pittman could (1) maintain his current appointed counsel, (2) hire an attorney at his own expense, or (3) represent himself." *Id*. at 425. When he continued to express dissatisfaction with his appointed counsel and declined to retain counsel, "the district court reasonably concluded that only the third option remained: proceeding pro se." *Id*. at 425-26.

Similarly, in *Oreye*, the defendant was admonished that if he dismissed his second appointed counsel and did not find a substitute at his own expense, he would have to proceed pro se. 263 F.3d at 670. The Seventh Circuit found that the defendant had waived his right to counsel by his conduct. *Id*. ("If you're given several options, and turn down all but one, you've selected the one you didn't turn down."). In so holding, the Seventh Circuit criticized cases (like *Goldberg*) that require evidence of misconduct to establish waiver by conduct. *Id*. at 670-71 ("these cases are wrong"; "question of waiver is one of inference from the facts," and "[a]s a matter both of logic

and of common sense . . . if a person is offered a choice between three things and says 'no' to the first and the second, he's chosen the third even if he stands mute when asked whether the third is indeed his choice"); *see also United States v. Alden*, 527 F.3d 653, 660 (7th Cir. 2008) (same).

The dissenting Justice below thus got it right when he found that as early as February 20, 2014, the trial judge put petitioner on notice that "if he could not get along with the public defender, then he would either have to hire private counsel or represent himself." At the very latest, "it certainly should have been clear on April 24, 2014," when the court acknowledged that it was clear that petitioner wanted nothing to do with the public defender and petitioner advised that he was trying to find another attorney but had not yet hired one. *Lesley*, 2017 IL App (3d) 140793, ¶¶ 34-35. As the dissenting Justice stated, "It is hard to understand how anyone in the courtroom that day could not understand that the options were to get along and cooperate with the public defender, hire your own counsel, or proceed pro se." *Id.* ¶ 35. Indeed, as early as the November 21, 2013 hearing, the court admonished petitioner that if he was not going to listen to appointed counsel then he had to tell the court that he wanted to go pro se or retain counsel. R137 (Court: "if you're not going to listen to [Cappellini], then you have to tell me you want to go pro se. If you want to call Mr. Kuleck, you can do what you want but the point is whoever represents you is going to tell you that . . . you have to listen to them."). At the February 2014 hearing, when petitioner sought an

extension of time to try to retain counsel, the court twice admonished petitioner that she could not give petitioner another Public Defender, but could let him "hire somebody." R154. And at the April 2014 hearing, it was clear that petitioner "wanted nothing to do with" the public defender and sought additional time to retain counsel. R160. At the June 2014 hearing, the court again admonished petitioner that he could not "choose what Public Defender you're going to have so I'll allow the Public Defender to withdraw" and that the question then became whether petitioner "want[ed] to hire private counsel or . . . represent [him]self pro se."). R168; *see also* R72 (court admonished petitioner that at next hearing he should be prepared "either on [his] own or with a lawyer" to proceed on State's motion to dismiss).

Here, as in *Pittmann* and *Oreye*, petitioner was offered a choice of proceeding with appointed counsel, retaining counsel, or proceeding pro se. By his conduct, petitioner said "no" to the public defender (by refusing to cooperate with him), and he said "no" to retaining counsel (when he was unsuccessful in doing so). Thus, by his conduct, petitioner chose to proceed pro se. Indeed, petitioner confirmed that choice at the conclusion of the hearing on the motion to dismiss, when he responded affirmatively to the court's question of whether he "still want[ed] to represent [him]self" at the evidentiary hearing. R183-84. Petitioner's response was an affirmative waiver of the right to counsel for the evidentiary hearing. *See Kidd*, 178 Ill. 2d at 104 (waiver is intentional relinquishment of known right). The

appellate court therefore erred in finding that petitioner did not waive his right to counsel by his conduct.

Defendant's waiver was knowing and intelligent.

Defendant's waiver was also knowing and intelligent. *See*, *e.g.*, *Alden*, 527 F.3d at 660; *Goldberg*, 67 F.3d at 1101 (waiver by conduct requires that defendant be warned about risks of proceeding pro se). In the context of a defendant's waiver of his constitutional right to counsel, courts review the defendant's "education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding," *Tovar*, 541 U.S. at 88; "the information a defendant must have to waive counsel intelligently will 'depend, in each case, upon the particular facts and circumstances surrounding that case,'" *id.* at 92 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The Court has "defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel"; a defendant's waiver is knowing "when he is made aware of these basic facts." *Patterson v. Illinois*, 487 U.S. 285, 299 (1988). "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances — even though the defendant may not know the specific detailed consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622,

629 (2002) (emphasis in original); *see also Patterson*, 487 U.S. at 294 (defendant's lack of "full and complete appreciation of all of the consequences flowing from his waiver" does not defeat State's showing that information provided to him satisfied the constitutional minimum).

Applying these principles, the Superior Court of Pennsylvania has held that to effect a knowing and understanding waiver of the statutory right to counsel in a postconviction proceeding, a petitioner must apprised of the right to appointed counsel. *See Com. v. Meehan*, 628 A.2d 1151, 1157 (Pa. Super. 1993) ("defendant must be apprised of his right to counsel and of the risks of forfeiting that right."). The court held that Meehan was sufficiently admonished where, in response to his stated dissatisfaction with appointed counsel, the court admonished him that he could proceed with appointed counsel or he could represent himself, but the court would not appoint a different attorney. *Id.* at 1157-59.

Here, too, petitioner was sufficiently aware of his right to — and even the usefulness of — counsel at the postconviction stage. At the very first hearing, the judge told petitioner that counsel would obtain the necessary plea transcripts and Cappellini told petitioner that he would get the transcripts and review them. Both appointed counsel discussed with petitioner the deficiencies in the pro se petition and the ways in which they proposed to amend it. And having "sat in [the judge's] courtroom numerous times," R117-118, in this case, as well as in connection with his prior

convictions, petitioner possessed a degree of legal sophistication and was well aware of the value of the assistance of counsel as a general matter and, more specifically, if the petition were advanced to a hearing. As in *Meehan*, petitioner was also admonished that if he discharged counsel, he could either retain counsel or proceed pro se, but he could not choose his public defender. Having been made aware of all of these basic facts, petitioner's waiver was knowing and intelligent.

Additionally, "[a]lmost without exception, [*Johnson*'s] requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973); *see also id.* at 241 ("A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial."). Given the difference between the waiver of the right to counsel at trial and the waiver of the statutory right to counsel on collateral review, *i.e.*, after a fair trial (or a valid plea of guilty), a less stringent standard of waiver should apply to waivers of rights not so guaranteed.

Moreover, as the dissenting Justice concluded, to the extent that Rule 401 applies in the postconviction context, there was substantial compliance: petitioner knew the nature of the charge and his sentencing exposure, and he

was aware that he had a right to appointed counsel. *Lesley*, 2017 IL App (3d) 140793, ¶ 35. The appellate majority appeared to agree that Rule 401 did not apply here. *Lesley*, 2017 IL App (3d) 140793, ¶ 22 (citing *Young*, 341 Ill. App. 3d at 387) (compliance with Rule 401 not required in posttrial proceedings after defendant already convicted and sentenced). Indeed, by its terms, Rule 401 applies only to "a person accused of an offense punishable by imprisonment." But even if Rule 401(a) applied here, only the last of its warnings — requiring the court to admonish a defendant "that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court" — has any application in the postconviction context. Because petitioner understood that right, there was substantial compliance. *See Com. v. Robinson*, 970 A.2d 455, 459-60 (Pa. Super. 2009) (although portions of Pennsylvania's analog to Rule 401 do not apply in postconviction context, defendant must be admonished in accordance with remaining, relevant portions in on-record colloquy).

CONCLUSION

This Court should reverse the appellate court's judgment and affirm the circuit court's judgment denying postconviction relief.

January 8, 2018

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

KATHERINE M. DOERSCH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-6128
kdoersch@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirty-five pages.

s/Katherine M. Doersch
Assistant Attorney General

APPENDIX

E-FILED
1/8/2018 2:36 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF CONTENTS TO THE APPENDIX

INDEX TO RECORD ON APPEAL

Common Law Record

Post-Conviction

Report of Proceedings

Post-Conviction

Witness Mike Olewinski

One Envelope of Defendant's Post-Conviction Exhibits

Exh. 1 (Excerpt from Grand Jury Transcript)

Exh. 1B (Laboratory Report)

Exh. 1C (Laboratory Report)

Exh. 1D (Laboratory Report)

Exh. 1E (Laboratory Report)

Exh. 2 (Excerpt of Plea Proceedings)

Exh. 3 (Letter)

Exh. 3A (Proof of Service)

Exh. 3A[1] (Rule 412 Certification)

Exh. 4 (Laboratory Report)

2017 IL App (3d) 140793
Appellate Court of Illinois,
Third District.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Myron T. **LESLEY**, Defendant–Appellant.

Appeal No. 3–14–0793

Opinion filed March 2, 2017

Synopsis

Background: Following his convictions upon a guilty plea of unlawful possession of a controlled substance with intent to deliver and unlawful delivery of a controlled substance, defendant filed postconviction petition. The 13th Judicial Circuit Court, La Salle County, No. 12–CF–86, Cynthia M. Raccuglia, J., denied petition. Defendant appealed.

[Holding:] The Appellate Court, Lytton, J., held that defendant did not waive his statutory right to postconviction counsel by his conduct, even though he repeatedly failed to cooperate with counsel.

Reversed and remanded with directions.

Schmidt, J., dissented and filed opinion.

Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois, ***44** Circuit No. 12–CF–86, Honorable Cynthia M. Raccuglia, Judge, Presiding.

Attorneys and Law Firms

Michael J. Pelletier and Tiffany Boye Green, of State Appellate Defender's Office, of Chicago, for appellant.

Karen Donnelly, State's Attorney, of Ottawa (Richard T. Leonard, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

OPINION

JUSTICE LYTTON delivered the judgment of the court, with opinion.

****604** ¶ 1 Defendant, **Myron** T. **Lesley**, raises two issues for our review. First, he argues that the trial court erred in forcing him to represent himself at his evidentiary hearing due to disagreements he had with his appointed counsel without first warning defendant that his conduct could result in the waiver of his right to counsel, and second, the trial court applied a misconduct standard of proof at the evidentiary hearing. Because we reverse and remand on the first issue, we need not reach the second.

¶ 2 FACTS

¶ 3 On June 13, 2013, defendant pled guilty to the offenses of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)) and unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2012)) in exchange for consecutive sentences of five years' imprisonment and six years' imprisonment, respectively. The State also agreed to dismiss four additional charges.

¶ 4 On September 30, 2013, defendant filed a postconviction petition arguing that he received ineffective assistance of plea counsel in that counsel failed to adequately investigate the case and gave him erroneous advice. The petition also claimed that defendant's sentences "could have been ran concurrently * * * when nothing was stated in sentencing on the reason for consecutively."

¶ 5 On October 30, 2013, the State filed a motion to dismiss the postconviction petition. At a hearing the next day, the trial court appointed the public defender to represent defendant. On November 21, 2013, defendant appeared with Timothy Cappellini, the La Salle County public defender, for a "first appearance" hearing on the postconviction petition. Defendant informed the court that he and Cappellini had a disagreement. Defendant stated that Cappellini told defendant to "go *pro se* and do it [himself]" when defendant told Cappellini he needed to see transcripts of prior proceedings. Cappellini responded:

"I said if he doesn't want me to represent him, he can go *pro se*. Otherwise, I will acquire the transcripts, I will review 'em and I will be the attorney." The trial court continued the matter.

¶ 6 On February 20, 2014, Douglas Kramarsic, an assistant public defender, appeared on behalf of defendant at a status hearing. Kramarsic stated that he had previously met with defendant to attempt to explain changes he wanted to make to the postconviction petition. Defendant became "very belligerent" and told Kramarsic "numerous times to go fuck [him]self." Defendant said that Kramarsic was "fired" and he wanted to hire his own attorney. Defendant grabbed the papers out of Kramarsic's hands "in a physical and aggressive manner." Kramarsic then left the room as defendant continued to yell obscenities at him.

¶ 7 Kramarsic then stated: "Your Honor, I believe at this point it's clear that [defendant] does not wish to continue with me as his attorney, and I'll leave it to the Court's discretion as to what should take ***45 **605** place next." The trial court told defendant he could respond, and defendant stated:

> "First of all, Your Honor, he came back there and told me something totally different. It wasn't all this and that. It got out of hand—not out of hand, he tried to treat me like I'm stupid or something. * * * [A]nd then I'm trying to show him something and he's ignoring it and I'm yelling at him, I don't think he's trying to help me, he's trying to hurt me."

¶ 8 The trial court said that defendant had been appointed several public defenders and there was no one left to appoint. The trial court also told defendant that he did not have a choice as to which attorney he was assigned from the public defender's office. Defendant indicated that he wished to hire his own attorney, and the trial court granted him a 60–day continuance to do so. The trial court stated, "I can't give you another Public Defender but I can certainly let you hire somebody." The following exchange then occurred between the trial court and Kramarsic:

> "MR. KRAMARSIC: Your Honor, I guess at this point it may leave me in limbo. I guess if you're still leaving me as the attorney of record, there are issues that I would want to correct with this but [defendant] certainly does not wish to hear anything that I have to say.
>
> * * *
>
> THE COURT: Is there anything that you want to put on the record today?
>
> MR. KRAMARSIC: I mean, I would just like to say that I have reviewed the records, I have reviewed everything involved in this case. I haven't filed my certification regarding that, which I was going to file with my amended petition, but I can't even get to the point of being able to do that.
>
> THE COURT: And I won't have you do that.
>
> MR. KRAMARSIC: Okay.
>
> THE COURT: Right now, nothing you will do, because he's requested time to—
>
> MR. KRAMARSIC: Sure.
>
> THE COURT: —get a private lawyer.
>
> And so I'm reserving my ruling on you filing anything, nor are you under any obligation to do that until I see what [defendant] can find in 60 days, so let's do that for you."

¶ 9 Another status hearing was held on April 24, 2014. Kramarsic advised the court that he attempted to discuss with defendant whether defendant had been able to hire private counsel and "it [was] one hundred percent absolutely clear from our conversations that [defendant] want[ed] nothing to do with [Kramarsic] in this case." Defendant stated that he was trying to find an attorney but had not hired one yet. The trial court scheduled a hearing on the State's motion to dismiss for June 12, 2014. The trial court told Kramarsic: "I'm aware he won't talk to you. And so you won't be representing him at any hearing at this point." The trial court then stated:

> "THE COURT: All right. * * * And if [defendant] doesn't have a lawyer [at the hearing on the motion to dismiss], I'll have to address him as to his options.
>
> But you put on the record he doesn't want to talk to you. That's fine. You have—

I'm not dismissing you completely, I'm leaving options open. But I won't expect you to be prepared for a hearing is what I am saying.

MR. KRAMARSIC: Okay.

THE COURT: You're still in the case."

***46 **606** ¶ 10 At the hearing on June 12, defendant had not hired private counsel. The following exchange occurred:

"[THE COURT:] * * * Now, [defendant], it's my understanding that you still want to proceed *pro se* to represent yourself?

THE DEFENDANT: I'm going to have to, Your Honor, yes, ma'am.

THE COURT: Why are you going to have to?

THE DEFENDANT: I asked [Kramarsic] three times back there are you going to help me and he gave me no answer.

THE COURT: Now, when you say, is he going to help you, what do you mean by that? I need to investigate this issue.

THE DEFENDANT: That's what I'm saying, is he going to help me try to get through this post-conviction?

THE COURT: Well, he has so far, has he not? Mr. Kramarsic?

THE DEFENDANT: He hasn't filed no motion or nothing.

THE COURT: You need to address this issue because when there's a complaint, you know, we need to have an answer here.

MR. KRAMARSIC: Your Honor,—

THE COURT: It's not just—[defendant's] complaining not just that he wants to represent himself but he says that you said you're not going to help him so why don't you respond.

MR. KRAMARSIC: You Honor, I have. This is the third time I've attempted to talk to [defendant] about this case. First time that I met with him he did not agree with the—with my ideas with the case and the way I wanted to proceed and I told him I didn't believe the issues here—that we had strong issues, and he wanted to proceed with what he thought was the right way to do it and not even listen to the way I wanted to proceed with the case. That was the first time.

The second time I met with him again I tried again to explain what I felt about the case. Again, he disagreed with me. That was the time that he lunged at me and swore at me and told me to leave, and certainly I could tell at that point that obviously he does not want me to help him at all. He just doesn't agree with my theory of the case and clearly does not want me involved with it and I feel like I'm stuck here because I don't know what else to do. [Defendant has] told me numerous times he does not want me to do anything.

THE COURT: All right, well, I find knowing [defendant], and considering the issues involved here, that it appears you do not want to listen to Mr. Kramarsic.

Now the question—I will allow—you can't choose what Public Defender you're going to have so I'll allow the Public Defender to withdraw.

Now, the question becomes, [defendant], the only right to a lawyer that you have—I feel you are capable of representing yourself if that is your desire, is whether you want to hire private counsel or you want to represent yourself *pro se*.

That's the first question I have of you. What is your answer?

THE DEFENDANT: I was trying to hire private counsel, Your Honor, you know what I'm saying, but finally no funding. * * *

THE COURT: * * * do you want to represent yourself?

THE DEFENDANT: No, I can't represent myself.

THE COURT: Well, you're going to have to.

***47 **607** THE DEFENDANT: All right, let's go.

THE COURT: When you say you can't—are you telling me that you're not going to be able to hire private counsel?

THE DEFENDANT: I'm waiting on my parents."

¶ 11 The court asked defendant if he was ready to proceed on the State's motion to dismiss, and defendant replied, "I guess so." The court then asked defendant to answer "yes" or "no," and defendant said, "I got no attorney. I guess not." The court granted defendant a 35-day continuance. At the hearing, defendant filed an untitled, handwritten document arguing that the State erred in charging him with an offense he committed while released on bond under the same criminal case number as the underlying offense.

¶ 12 On July 17, 2014, a hearing was held on the State's motion to dismiss. Defendant appeared *pro se*. The trial court granted the motion in part but ordered that an evidentiary hearing be held on the issue of ineffective assistance of counsel.

¶ 13 On October 2, 2014, an evidentiary hearing was held. Defendant appeared *pro se* at the evidentiary hearing. Defendant's plea counsel was the only witness. The trial court denied defendant's postconviction petition following the hearing.

¶ 14 ANALYSIS

[1] **[2]** **[3]** ¶ 15 The Post–Conviction Hearing Act (Act) affords indigent defendants the right to counsel beyond the first stage of proceedings. 725 ILCS 5/122–4 (West 2014). The right to assistance of postconviction counsel derives from the Act rather than the constitution. *People v. Cotto*, 2016 IL 119006, ¶ 29, 402 Ill.Dec. 50, 51 N.E.3d 802. Our supreme court has held that "a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill.2d 458, 472, 308 Ill.Dec. 434, 861 N.E.2d 999 (2006) (quoting *People v. Munson*, 206 Ill.2d 104, 137, 276 Ill.Dec. 260, 794 N.E.2d 155 (2002)). "[A] defendant has a right to proceed *pro se* in postconviction proceedings." *People v. Heard*, 2014 IL App (4th) 120833, ¶ 10, 380 Ill.Dec. 277, 8 N.E.3d 447 (citing 725 ILCS 5/122–4 (West 2010)). However, a defendant must "knowingly and intelligently relinquish [ ] his right to counsel, and his waiver [must be] clear and unequivocal, not ambiguous." *Id.*

[4] ¶ 16 Defendant argues that the trial court erred in forcing him to represent himself. Because defendant did not waive his right to appointed counsel, either expressly or through his conduct, the trial court erred in requiring defendant to proceed *pro se*.

[5] **[6]** ¶ 17 A defendant can expressly waive the right to counsel. A defendant may also relinquish his right to counsel in two additional ways, forfeiture and waiver by conduct. *People v. Ames*, 2012 IL App (4th) 110513 ¶ 26, 365 Ill.Dec. 616, 978 N.E.2d 1119. (1) "[F]orfeiture, strictly defined, is different from waiver because instead of being an intentional relinquishment of a known right, forfeiture is the failure to make the timely assertion of the right." *Id.* ¶ 28.

> "[Forfeiture of counsel] may occur because of a defendant's severe misconduct without the defendant's first having been warned of the consequences of his engaging in that severe misconduct. 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 was necessary or foreseeable before the court concludes that the defendant has forfeited his right ***48** ****608** to counsel and will be required to henceforth represent himself." *Id.* ¶ 37.

¶ 18 The Arizona Supreme Court found that "forfeiture [of counsel] is reserved for the most severe cases of misconduct and should result only when less restrictive measures are inappropriate." *State v. Hampton*, 208 Ariz. 241, 92 P.3d 871, 874 (2004) (*en banc*) (cited in *Ames*, 2012 IL App (4th) 110513, ¶ 32, 365 Ill.Dec. 616, 978 N.E.2d 1119).

[7] **[8]** ¶ 19 (2) Waiver by conduct, on the other hand, requires that the trial court first warn a defendant that he could lose his right to appointed counsel if his misconduct continues.

> " 'Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. * * *

* * *

These are not "waiver" cases in the true sense of the word. In many situations[,] there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed *pro se*. These defendants cannot truly be said to be "waiving" their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se*.' " *Ames*, 2012 IL App (4th) 110513, ¶ 34 [365 Ill.Dec. 616, 978 N.E.2d 1119] (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100–01 (3d Cir. 1995)).

[9] ¶ 20 Before a trial court may find that a defendant has waived his right to counsel by conduct, "the court must first comply with the requirements of Rule 401(a), explaining to the defendant what is at stake if his conduct continues." *Id.* ¶ 38. " ' "A court is under no less obligation to ensure that waiver is knowing and intelligent when voluntariness is deduced from conduct than when it is asserted expressly." ' " *Id.* ¶ 39 (quoting *State v. Weiss*, 92 Ohio App.3d 681, 637 N.E.2d 47, 50 (1993), quoting *United States v. Allen*, 895 F.2d 1577, 1579 (10th Cir. 1990)). *Ames* found that the trial court committed reversible error in finding that the defendant had waived his right to counsel by his conduct because the trial court never admonished the defendant pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). *Id.* ¶ 38.

¶ 21 Here, the trial court never warned defendant that he would lose his right to appointed counsel if his misconduct toward his appointed attorney continued. See *Ames*, 2012 IL App (4th) 110513, ¶¶ 34, 38, 365 Ill.Dec. 616, 978 N.E.2d 1119. In the absence of such a warning, defendant's repeated failure to cooperate with his appointed counsel cannot be construed as a knowing waiver. See *id.* ¶ 39.

[10] ¶ 22 The State argues that this case involves postconviction proceedings, which gives the defendant a statutory right to counsel rather than a constitutional one. Also, admonitions pursuant to Rule 401 are not applicable in postconviction proceedings. See *People v. Young*, 341 Ill.App.3d 379, 387, 275 Ill.Dec. 237, 792 N.E.2d 468 (2003) (holding that compliance with Rule 401 was not required during posttrial proceedings after the defendant was already convicted and sentenced). Nonetheless, we find that, under these circumstances, the trial court was required to warn defendant that his continued misconduct could result in waiver of his statutory right to counsel before defendant could waive his right to counsel by conduct. The distinction between how and where the defendants' right to counsel originated is one without significance.

***49 **609** ¶ 23 The trial court failed to warn defendant that he could waive his right to counsel through his conduct, but indicated that defendant would still have the option of appointed counsel if he failed to hire a private attorney. Despite Kramarsic's reports about conflict between defendant and him, the trial court maintained Kramarsic's appointment as counsel to "leav[e] options open." During this time, the trial court said that it was not dismissing Kramarsic completely, but, months later, the court allowed Kramarsic to withdraw based on his complaints that defendant would not listen to him. While it was certainly within the trial court's discretion not to permit Kramarsic to withdraw immediately, the court erred by permitting him to withdraw before warning defendant that he stood to lose his right to appointed counsel if his behavior continued.

¶ 24 Even so, the State argues that defendant forfeited his right to counsel through his severe misconduct, relying on *United States v. McLeod*, 53 F.3d 322, 324–25 (11th Cir. 1995). In *McLeod*, the court found that the defendant forfeited his right to counsel based on his "pervasive misconduct." *Id.* Defendant's attorney testified that the defendant was verbally abusive, threatened to harm him, threatened to sue him, and attempted to persuade him to engage in unethical conduct. *Id.* at 325. Because of McLeod's actions, the court found a forfeiture of defendant's right to an attorney. The court was "troubled" by the trial court's failure to warn defendant, but found that the defendant's actions were "repeatedly abusive, threatening and coercive." *Id* at 326.

¶ 25 In this case, defendant yelled obscenities at Kramarsic and pulled the papers out of Kramarsic's hands. Though defendant's behavior was certainly inappropriate, we do not find that his misconduct was so severe that no warning was necessary or foreseeable. See *Ames*, 2012 IL App (4th) 110513, ¶ 37, 365 Ill.Dec. 616, 978 N.E.2d 1119. While the trial court has discretion to determine whether the severity of a defendant's misconduct requires forfeiture, under these facts, a warning would have been the appropriate remedy.

¶ 26 We can only praise the trial judge for her patience and resolve during the trial of this matter, but we must reverse and remand for the above stated reasons.

¶ 27 CONCLUSION

¶ 28 The judgment of the trial court denying defendant's postconviction petition is reversed. We remand the matter for the appointment of counsel and new second stage proceedings. On remand, appointed counsel may file an amended petition, if appropriate, and the State may respond accordingly.

¶ 29 Reversed and remanded with directions.

Justice McDade concurred in the judgment and opinion.

Justice Schmidt dissented, with opinion.

¶ 30 JUSTICE SCHMIDT, dissenting.
¶ 31 For the following reasons, I would affirm the trial court and, therefore, respectfully dissent.

¶ 32 The record shows and the facts set out by the majority show that this trial judge was more than patient and that defendant was well aware that his refusal to work with the public defender would leave him with two choices: hire private counsel or proceed *pro se*. *Supra* ¶¶ 5–12.

¶ 33 It was obvious at a hearing on November 21, 2013, that defendant was not happy with and would not accept the help of the first public defender involved. On February 20, 2014, a second assistant public defender appeared and advised the ***50 **610** court that defendant had been very belligerent and swore at him. The court advised defendant that there were no more public defenders and there was no one left to appoint. Defendant indicated that he wanted to hire his own attorney and the court gave him 60 days.

¶ 34 At the April 24, 2014, status hearing, the court acknowledged that it was clear that defendant wanted nothing to do with the public defender in this case. Defendant advised that he was trying to find another attorney but had not yet hired one. The trial court, again, continued the hearing on the State's motion to dismiss until June 12.

¶ 35 At the June 12 hearing, defendant had not yet hired private counsel. After discussions, the court pointed out that it was clear defendant would not listen to the public defender and allowed the public defender to withdraw. The court explained that defendant could either hire private counsel or represent himself *pro se*. Defendant said he needed more time as he did not have the funds to hire private counsel. The court continued the matter until July 17, 2014. It seems clear that from as early as February 20, 2014, the trial court was putting defendant on notice that if he could not get along with the public defender, then he would either have to hire private counsel or represent himself. If it was not clear then, it certainly should have been clear on April 24, 2014. It is hard to understand how anyone in the courtroom that day could not understand that the options were to get along and cooperate with the public defender, hire your own counsel, or proceed *pro se*. To the extent that Rule 401 admonishments are required in postconviction proceedings, there was substantial compliance.

¶ 36 For his second issue, defendant argues that the trial court denied his postconviction petition after an evidentiary hearing by applying the wrong standard. Defendant argues that the court required defendant to establish that he would have been found innocent if the cause had proceeded to trial. Defendant then argues that the correct standard is "whether but for counsel's deficiencies, the defendant would have gone to trial." That is not the standard. The standard would be whether but for counsel's deficiencies, a reasonable person in defendant's position would have gone to trial. That is, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *People v. Rissley*, 206 Ill.2d 403, 457, 276 Ill.Dec. 821, 795 N.E.2d 174 (2003). A bare assertion is insufficient. *Id.* at 457–60, 276 Ill.Dec. 821, 795 N.E.2d 174. At the evidentiary hearing on the postconviction petition, defendant's plea counsel testified. Defendant did not. Plea counsel testified that defendant knowingly decided to plead guilty after going over all the facts and the State's case. Plea counsel denied putting any pressure on defendant into taking the plea. Defendant never claimed that he was either innocent or had a plausible defense. *Id.* at 460, 276 Ill.Dec. 821, 795 N.E.2d 174; see also

People v. Hall, 217 Ill.2d 324, 335–36, 299 Ill.Dec. 181, 841 N.E.2d 913 (2005). Under any standard you choose, pick one, the trial court did not err in denying defendant's postconviction petition. We review the court's judgment, not its reasoning. *Material Service Corp. v. Department of Revenue*, 98 Ill.2d 382, 387, 75 Ill.Dec. 219, 457 N.E.2d 9 (1983).

All Citations

2017 IL App (3d) 140793, 76 N.E.3d 42, 412 Ill.Dec. 602

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 8, 2018, the foregoing **Brief and Appendix of Respondent-Appellant** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below:

Tiffany Boye Green
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle Street, 24th Floor
Chicago, Illinois 60601

1stdistrict.eserve@osad.state.il.us
Tiffany.Green@osad.state.il.us

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Katherine M. Doersch
KATHERINE M. DOERSCH
Assistant Attorney General

E-FILED
1/8/2018 2:36 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK