No. 122100

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF RESPONDENT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

ARGUMENT

The People's opening brief established that petitioner forfeited his statutory right to postconviction counsel due to his repeated misconduct: petitioner argued with his first appointed attorney, PD Cappellini, about obtaining the transcripts of his plea hearing; refused to listen when Cappellini tried to explain the governing law; insisted that Cappellini was wrong and that things had to be done petitioner's way; repeatedly cursed at his second appointed attorney, APD Kramarsic; and lunged at him and aggressively pulled papers from his hand. Forfeitures of trial counsel have been upheld for misconduct well short of a physical assault, and although courts have suggested that more egregious misconduct might be required to justify a forfeiture of counsel at trial, less egregious conduct suffices to justify a forfeiture of counsel at other stages, and petitioner's conduct was sufficiently severe to warrant that outcome. Peo. Br. 21-27.[1]

Alternatively, petitioner waived his right to postconviction counsel through his conduct. Petitioner was offered a choice of proceeding with appointed counsel, retaining counsel, or proceeding pro se. Petitioner effectively said no to the public defender by aggressively refusing to cooperate with his appointed attorneys, "firing" appointed counsel, and declaring his

[1] "Peo. Br._" refers to the People's opening brief before this Court; "Pet. Br. _" refers to petitioner-appellee's brief before this Court; "R_" refers to the report of proceedings; and "C_"refers to the common law record.

intention to retain private counsel, and he effectively said no to retaining counsel when he was unsuccessful in doing so. Thus, by his conduct, petitioner chose to proceed pro se. Peo. Br. 28-34.

Petitioner's contrary arguments are unpersuasive. The circuit court did not "force" petitioner to represent himself. Pet. Br. 1. Rather, petitioner refused the assistance of two appointed attorneys and forfeited (or waived) his right to appointed counsel by his conduct. To begin, this Court should reject petitioner's assertion that unlike the defendants in the People's cited cases, petitioner "displayed inappropriate conduct on a single occasion, and nothing was so egregious as to justify a finding of forfeiture of counsel." Pet. Br. 22. Petitioner's contention that his misconduct was limited to a single occasion cannot be squared with the record. Petitioner's representation that on November 21, 2013, "no misconduct occurred," *id*., overlooks that on that date, his first appearance with appointed counsel, petitioner told the court that he and PD Cappellini were "having a conflict already." R134. Petitioner told Cappellini that he was going to retain attorney Ed Kulek and pushed Cappellini to the point where he told petitioner that if he did not want Cappellini to represent him, he could represent himself:

> 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.

R137. Petitioner's own remarks suggest that his interaction with Cappellini was more heated than it appeared from the courtroom discussion. R135 (Petitioner: "He's doing that in front of you, your Honor, because he did not say that back there."); *see also* R170 (petitioner later explaining to court at June 12, 2014 hearing that his difficulties with counsel were not limited to Kramarsic, in that he "got into it with Mr. Cappellini first").

Tension between Cappellini and petitioner remained evident at the January 9, 2014 status hearing, where petitioner complained to the court that he "need[ed] information," and Cappellini responded that "we are not here to try the case" or for a "retrial," but instead to determine whether petitioner's claims would be dismissed at the second stage of postconviction proceedings. R147.

The judge began the next hearing, on February 20, 2014, by noting that she had petitioner in shackles because she had been told that petitioner and Kramarsic had argued and that it was "best that he be shackled." R151. Kramarsic explained that he had met with petitioner with the intention of discussing the "problems" with petitioner's pro se petition and how to correct them, but "the conversation did not get to that point." R152. As Kramarsic attempted to discuss some proposed amendments,

> Mr. Lesley became very belligerent with me, told me numerous times to go fuck myself. He told me that he has fired me. That he wishes to hire his own lawyer. He, at that point, in a physical and aggressive manner, grabbed all the papers out of my hands. I at that point, I got up, I left the room while he continued to yell obscenities at me.

R152; *see also* R154 ("Mr. Lesley certainly does not wish to hear anything that I have to say"). Petitioner did not dispute Kramarsic's account; he merely responded that "[i]t 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"; and that "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." R153. Petitioner concluded by asking for a sixty-day continuance to hire an attorney. *Id*. The judge granted that request, stating, "I can see there was developing problems even before today." R154.

Kramarsic's statements at the outset of the next hearing, on April 24, 2014, confirm that petitioner's obstructive behavior continued; Kramarsic reported that he had tried to discuss matters with petitioner that morning, but that it was "one hundred percent absolutely clear from our conversations that he wants absolutely nothing to do with me in this case." R160. The court was aware that petitioner would not talk to Kramarsic and ordered that he would not be required to represent petitioner "at any hearing at this point." R161.

The next hearing took place on June 12, 2014. The judge stated her understanding that petitioner desired to represent himself, and petitioner responded, "I'm going to have to, Your Honor, yes, ma'am." R166. Petitioner told the judge that he had asked Kramarsic "three times back there are you going to help me and he gave me no answer." *Id*. Because petitioner was complaining not just that he wanted to represent himself, but also that Kramarsic had refused to help him, the court asked Kramarsic to address petitioner's allegations. *Id*. Kramarsic responded that this was the third time he had tried to talk to petitioner about his 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.

R167-68. "[K]nowing Mr. Lesley,"[2] and finding that he would not listen to Kramarsic, the court permitted Kramarsic to withdraw. R168.

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[2] The judge was familiar with petitioner from the guilty plea proceedings, where petitioner failed to appear for one scheduled hearing and his retained

The record thus contradicts petitioner's assertions that he was "essentially begging APD Kramarsic to represent him in post-conviction proceedings," Pet. Br. 26, and that "on June 12, 2014, [petitioner] appeared in court wanting to work with APD Kramarsic and asking for help from him," Pet. Br. 27. Rather, the record firmly establishes multiple instances of recalcitrant and aggressive behavior that worsened over time. And, as explained in the People's opening brief, petitioner's course of misconduct was sufficiently egregious to warrant forfeiture, particularly in light of precedent commonly upholding such forfeitures outside of the criminal trial stage. *See*, *e.g.*, *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").

Petitioner's contention that "Illinois courts have a well-established commitment to protecting a defendant's statutory right to counsel as strongly as a defendant's constitutional right to counsel," Pet. Br. 8 (initial capitalizations omitted), finds no support in his cited cases. For example,

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counsel was granted leave to withdraw due to petitioner's failure to cooperate with counsel. *See* C37, 39. After obtaining two continuances to try to "get somebody else," R59, on January 24, 2013, petitioner again failed to appear, R68, and the court found that it was "very clear" that petitioner went to the hospital that day just to avoid the proceedings, R71. The court's factual findings are properly assessed in light of this background. *E.g.*, *People v. Parcel of Property Commonly Known as 1945 North 31st St.*, 217 Ill. 2d 481, 509-10 (2005) (trial judge in superior position to the reviewing court to witness demeanor and credibility).

petitioner's reliance on *People v. Campbell*, 224 Ill. 2d 80 (2007), is misplaced. There, the defendant appeared without counsel and requested a bench trial. *Id*. at 82. The defendant was convicted and, on appeal, argued that his conviction should be reversed because the court accepted his attorney waiver without first admonishing him according to Supreme Court Rule 401. *Id*. This Court held that by its plain terms Rule 401 applied. *Id*. at 84. The Court rejected the People's argument that the rule should not apply because the defendant had no constitutional right to counsel, finding that the plain language of the rule governed. *Id*. at 87 ("Rule 401's express-waiver requirement is defined by the plain language of the rule, not by the scope of the sixth amendment right to counsel."). Contrary to petitioner's argument, however, *Campbell* did not hold that "a defendant's waiver of counsel must be knowing, intelligent and voluntary — regardless of whether that right derives from the constitution or statute." Pet. Br. 10. At most, *Campbell* stands for the proposition that even where a defendant's right to trial counsel is statutory, by its plain terms, Rule 401 applies whenever the defendant is accused of an offense punishable by imprisonment. 224 Ill. 2d at 84. *Campbell* had nothing to say about forfeiture or waiver by conduct. And because petitioner concedes that "Rule 401(a) does not apply in post-conviction proceedings," Pet. Br. 10, *Campbell* is inapposite. *People v. Vernón*, 396 Ill. App. 3d 145 (2d Dist. 2009), *see* Pet. Br. 10, also addresses Rule 401(a) compliance and is similarly unhelpful.

People v. Gray, 2013 IL App (1st) 101064, ¶¶ 24, 27, *see* Pet. Br. 10, held that the circuit court abused its discretion when it declined to rule on a postconviction petitioner's request to proceed pro se. And *People v. Reid*, 2014 IL App (3d) 130296, ¶16, held that the admonishments given to a defendant who, in exchange for the State's agreement not to pursue a capital sentence, had waived his right to file a postconviction petition, were sufficient and that, as a result, the defendant's waiver was valid. Any discussion of the standards applicable to postconviction attorney waivers in these cases was therefore dicta.

More importantly, 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, and courts are more willing to find forfeiture of the right to counsel outside the "main event" of trial. *United States v. Leggett*, 162 F.3d 237, 251 n.14 (3d Cir. 1998) (forfeiture of counsel at sentencing does not deal as serious a blow to defendant as forfeiture of counsel at trial); *Gilchrist v. O'Keefe*, 260 F.3d 87, 99 (2d Cir. 2001) (affirming forfeiture at sentencing and suggesting "potentially heightened burden of justification that might be associated with a denial of counsel at trial"). Petitioner misapprehends the People's point: the People do not argue that the right to postconviction counsel should not be protected, but rather that forfeiture rules should also apply at this stage and that

unlike forfeiture of the right to counsel at trial, which courts have held may require some heightened justification, forfeiture of counsel at other trial stages and on collateral review may be justified by a lesser showing.[3]

Petitioner protests that the postconviction court should have warned him that "if he continued to disagree and argue with his attorney, he would lose his right to appointed counsel and be required to represent himself." Pet. Br. 26. But, as explained in the People's opening brief, the court *did* warn petitioner that if he could not get along with appointed counsel, he would have to retain counsel or represent himself. Accordingly, when petitioner persisted in this conduct, he waived his right to appointed counsel.

At petitioner's November 21, 2013 first appearance on the postconviction matter, the court admonished him 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

[3] In connection with this argument, petitioner also incorrectly maintains that he "could not have raised a claim of trial counsel's ineffective assistance at plea proceedings on direct appeal, because the ineffective assistance of counsel claim he raised necessarily required evidence of facts not contained in the record in the trial court." Pet. Br. 13. To the contrary, petitioner could have filed a motion to withdraw his guilty plea and made a record of his contentions at a hearing on his motion. *See*, *e.g.*, *People v. Tousignant*, 2014 IL 115329, ¶ 14 (discussing purpose of Supreme Court Rule 604(d)).

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 she could let him "hire somebody." R154. And at the June 2014 hearing, the court again admonished petitioner that he could not "choose what Public Defender you're going to have" and that the question then became whether petitioner "want[ed] to hire private counsel or . . . represent [him]self pro se." R168; *see also* R172 (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).

Thus, as the dissent below correctly found, as early as February 20, 2014, the postconviction 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," and that at the latest, "it certainly should have been clear on April 24, 2014," when the court acknowledged 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. *People v. Lesley*, 2017 IL App (3d) 140793, ¶¶ 34-35.

Petitioner maintains that because the court's warnings came after petitioner's disagreement with Kramarsic, they "did not constitute a warning

of any kind about future misconduct." Def. Br. 27. Presumably, petitioner intends by this to argue that the warning came too late for his misconduct against Kramarsic to constitute a waiver by conduct. This argument fails for two reasons. First, the court warned petitioner from his very first appearance on the postconviction petition 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. So even if the court was required to warn petitioner before he lunged at Kramarsic, aggressively ripped the papers out of his hands and repeatedly told him to "go fuck [him]self," that warning was timely.

And second, as discussed in the People's opening brief, no *mis*conduct at all is required to establish a waiver by conduct. Instead, the "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." *United States v. Oreye*, 263 F.3d 669, 670-71 (7th Cir. 2001); *see also United States v. Pittman*, 816 F.3d 419, 425-26 (6th Cir. 2016); *United States v. Alden*, 527 F.3d 653, 660 (7th Cir. 2008). And, given the People's extended discussion of the factual record here and in their opening brief, Peo. Br. 5-14, this Court should reject petitioner's attempt to distinguish the above cases on the

counterfactual basis that petitioner "simply wanted to proceed with his current court-appointed attorney." Pet. Br. 34.

As in *Pittmann* and *Oreye*, petitioner was offered a choice of continuing with the public defender, retaining counsel, or proceeding pro se. Petitioner said "no" to the public defender (by refusing to cooperate with and rejecting the assistance of two appointed attorneys) and to retaining counsel (when he was unsuccessful in doing so). Thus, as a matter of logic and common sense, by his conduct, petitioner chose to proceed pro se. And whether petitioner conducted the evidentiary hearing like a lawyer or would have benefitted from the assistance of counsel, Pet. Br. 36-39, is beside the point.

CONCLUSION

This Court should reverse the appellate court's judgment.

April 17, 2018

Respectfully submitted,

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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 thirteen pages.

s/Katherine M. Doersch
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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 April 17, 2018, the foregoing **Reply Brief 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:

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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.

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