

No. 1-17-1582

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 13 CR 7738
)	
ANTHONY JACKSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion in disqualifying defendant’s chosen counsel.

¶ 2 In this interlocutory appeal, defendant Anthony Jackson claims that the trial court committed reversible error when it disqualified his chosen counsel, George Jackson III, from further representing him during retrial proceedings. Jackson, defendant’s brother, represented defendant during his first trial and succeeded in obtaining a new trial for defendant based on co-counsel’s ineffective assistance. The trial court disqualified Jackson, finding he had been dilatory in filing defendant’s answer to discovery relating to the retrial. Because we find that the trial

court abused its discretion in disqualifying defendant's chosen attorney, we reverse the trial court's disqualification and remand for retrial.

¶ 3

BACKGROUND

¶ 4

At about 11:30 a.m. on March 16, 2013, defendant beat and "stomped" Sanchez Mixon while he stood on a CTA elevated platform located at 43rd street in Chicago. The CTA's video surveillance recorded the beating. Mixon died from blunt force trauma to his head, which was inflicted during the beating.

¶ 5

Two days later, Jackson brought defendant to the police station and identified himself as defendant's attorney. Defendant was charged with two counts of first degree murder. David Wiener and Jackson were defendant's privately retained counsel and represented him throughout his jury trial. At trial, defendant claimed he acted in self-defense. Defendant's trial began on January 12, 2015 and on January 15, 2015, after the jury deliberated for 1 hour and 25 minutes, defendant was found guilty of first degree murder.

¶ 6

Jackson continued to represent defendant posttrial, and through his investigative efforts, Jackson discovered that Mixon had a criminal record and a medical history of exhibiting violent and aggressive behavior.

¶ 7

Defendant filed a motion for a new trial, arguing that Wiener provided ineffective assistance of counsel because he did not view the video of the beating before trial started, even though the video was the State's primary evidence against defendant. And at times during the trial, Wiener appeared to be inebriated or under the influence of some substance.¹ Defendant also argued that had Mixon's criminal and medical records been reviewed, his violent and aggressive behavior documented in those records would have further supported defendant's self-defense

¹The Attorney Registration & Disciplinary Commission later suspended Wiener's law license based on its investigation of a complaint regarding Wiener's practice of the law.

claim. The defense asserted that sufficient evidence existed supporting the filing of a motion pursuant to *People v. Lynch*, 104 Ill. 2d 194, 200 (1984), seeking to introduce evidence of Mixon's propensity for violent and aggressive behavior and to demonstrate that he was the aggressor. The defense further asserted that an *ex parte* communication occurred regarding an error in the original transcript, which the court reporter then corrected.

¶ 8 During posttrial proceedings, defendant's case was assigned to a different judge due to the trial judge's absence from the bench.² On November 9, 2016, the trial court granted defendant a new trial. The trial court offered to appoint a public defender, and the matter was continued for Jackson to consult with defendant regarding his attorney of choice. Defendant elected to have his brother Jackson continue representing him.

¶ 9 On November 7, 2016, before the trial court ruled on defendant's motion for a new trial, the defense filed an emergency motion for a Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d *et seq.* (2012)) qualified protective order seeking Mixon's medical information. The State did not oppose the motion. The trial court denied the motion, but on November 20, 2016, granted the State's later filed motion for a HIPAA protective order. The trial court explained that it granted the State's motion because the State would be able to obtain the documents more quickly than defense counsel.

¶ 10 At the January 4, 2017 court date, the trial court inquired about the status of the defense's answer to discovery and the filing, if any, of a *Lynch* motion, informing the parties that

²On June 1, 2015, the trial judge who presided over defendant's trial denied defendant's motion for a new trial, in which Jackson raised ineffective assistance of counsel. After the case was assigned to a different judge, defendant filed another motion for a new trial, arguing a violation of his right to a speedy trial, which was denied. Defendant filed a third motion for a new trial, again arguing ineffective assistance of counsel, which was granted. The record in this interlocutory appeal is limited, lacking many of the underlying pleadings and transcripts; thus, it is unclear on what basis defendant was permitted to file a third motion for a new trial, arguing ineffective assistance of counsel. Nevertheless, defendant's renewed motion for a new trial based on his counsel's performance was granted.

defendant's answer to discovery must be filed before a trial date could be set. Jackson responded that he was waiting on documents from the State, and he did not want to file multiple *Lynch* motions based on any additional documentation he received. Jackson asserted that he could not file an answer to discovery if it did not have all of the relevant records and documents. The trial court reiterated, "I really need your answer to discovery so we can get in the trial posture. That's what I'm really anxious to get, and a little communication between everybody might help move things along since we are waiting for something that I suspect you may already have but I need your answer and your motions." Shortly thereafter, defendant, who was present for the hearing, made an outburst stating, "I'm being tortured in jail. My life is in jeopardy. *** Judge, I need your help. My life is in jeopardy, Judge. I need your help. Judge, would you please help me." Following a brief recess, the matter was continued.

¶ 11 At the next court date on January 20, 2017, the State tendered records to the defense, which included copies of Mixon's criminal records. Jackson refused to acknowledge receipt of the records, asserting he did not have a chance to go through the records. The trial court again informed the parties that as soon as defendant filed an answer to discovery and any *Lynch* motion, the case would be set for trial. Jackson indicated that he anticipated filing the *Lynch* motion and answer to discovery within 30 days, or by February 24, 2017.

¶ 12 On February 24, 2017, instead of filing an answer to discovery, Jackson filed another motion for a HIPAA protective order. Jackson argued that the State's HIPAA protective order only allowed the State to obtain and receive protected health records, foreclosing the defense from obtaining any protected documents and forcing it to rely on the State to provide the protected documents. Jackson insisted that it was substantial prejudice to allow only the State to obtain all documents, and the defense should not be forced to have their requested documents

filtered through the State. Following a contentious exchange, the trial court admonished defense counsel about seeking duplicative documents, but granted defendant's motion for a HIPAA protective order, stating "You want to do it the long way, it's okay. He's the one in custody. *** You want to do it your way, I give up. I can't logic with you on some of these things." Jackson also moved to declare defendant indigent, but the trial court denied the motion, explaining that if defendant wanted to be declared indigent, then the court would appoint a public defender. The trial judge explained to defendant that a public defender could be appointed if he wished, but Jackson would no longer be able to represent him and it was "up to you." The trial court reiterated that it would not declare defendant indigent while he was being represented by private counsel. After the trial court refused to find defendant indigent, Jackson accused the trial judge of demonstrating bias, and suggested he remove himself from the case. The trial court instructed Jackson that if he wanted to pursue that strategy, he should file a motion for substitution of judge.

¶ 13 On May 1, 2017, Jackson appeared in court on a return of subpoenas that he issued. But Jackson subpoenaed documents that had already been tendered to the State. After another contentious exchange, the trial court stated that Jackson was wasting time, being dilatory, and interfering with the administration of justice. The trial court instructed Jackson to file an answer to discovery, cautioning that if he did not and if the case was not set for trial, then Jackson would be "off this case." The trial court ordered Jackson to file an answer to discovery by May 24, but Jackson indicated that he was still conducting his investigation. The trial court explained that Jackson was duplicating efforts and requesting documents that he had already received. The trial court cautioned Jackson that he was in jeopardy of being removed from the case. The trial court offered to reschedule the May 24 date to a date selected by Jackson. Jackson responded that he

wanted two years, the same amount of time that the State was given to conduct its investigation in the murder trial, and that it was “pathetic” that he was given six months to conduct discovery and obtain all relevant records. The trial court stated that defendant would not sit in jail for two years for counsel to file an answer to discovery. The trial court continued:

“That’s right. It’s my decision. He is not going to wait that long. You know what, I think that’s it. I want Anthony here. I am going to have him here. I am going to be present. I think we are going to change lawyers. I think – we have had enough. *** I am going to explain to Anthony Jackson that you are no longer going to be representing him. You’re done.”

The trial court elaborated that defendant was in custody too long with too little happening after the new trial was granted. Jackson claimed that the trial court did not ask what had been done since the new trial was granted or what investigative steps had been taken. The trial court stated that Jackson was not going to remain defendant’s counsel “because I have had enough. *** Go home before you are in contempt.”

¶ 14 A few days later on May 5, 2017, Jackson filed a motion for substitution of judge, arguing that the trial court judge demonstrated bias against defendant and in favor of the State, particularly regarding the trial court’s ruling on the parties’ motions for HIPAA protective order. The motion also argued that the trial court lacked any authority to, *sua sponte*, replace defendant’s chosen counsel.

¶ 15 Jackson’s motion for substitution of judge for cause was transferred to another judge for hearing. On May 24, 2017, that judge denied defendant’s motion for substitution of judge, and

held Jackson in direct criminal contempt of court based on the nature of pleadings he filed.³ The same day, the trial court formally disqualified Jackson as defendant's chosen counsel. The trial judge explained that Jackson made personal attacks against the state's attorney and the court, and that Jackson was not capable of restraining himself and practicing law competently. The trial judge also expressed concern about how Jackson would address the jury during retrial. The trial court appointed the public defender to represent defendant. Defendant later filed a motion informing the court that if he could not have his brother represent him, he would proceed *pro se*.

¶ 16 Defendant filed a petition for interlocutory appeal seeking review of the trial court's order disqualifying Jackson as his chosen attorney, which this court granted.⁴

¶ 17 ANALYSIS

¶ 18 The sole issue on appeal is whether the trial court abused its discretion when it disqualified defendant's chosen counsel from further representing defendant.

¶ 19 The sixth amendment of the United States Constitution guarantees a criminal defendant the right to the assistance of counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006); *People v. Brown*, 2017 IL 121681, ¶ 25; *People v. Ortega*, 209 Ill. 2d 354, 358 (2004). At the root of the sixth amendment right to counsel, is the defendant's right to choose who will represent him or her. *People v. Rivera*, 2013 IL 112467, ¶ 37; *People v. Holmes*, 141 Ill. 2d 204, 217 (1990); *People v. Buckhanan*, 2017 IL App (1st) 131097, ¶ 26. But a defendant's right to counsel is not absolute and a trial court may exercise its discretion and disqualify chosen counsel based on the facts and circumstances in each case, which include disqualifying counsel in the event of a conflict of interest. *Rivera*, 2013 IL 112467, ¶ 37; *Holmes*, 141 Ill. 2d at 217. A trial

³Although the pleadings are not included in the record, the record reveals that Jackson was held in direct criminal contempt for filing a pleading that the judge hearing the substitution motion found to be racist, pornographic, and meant to intimidate in the nature of hate mail. The record also reveals that the respective pleading was sent to the Attorney Registration and Disciplinary Commission.

⁴By separate order, the court explained and apologized for the delay in addressing this appeal.

court's decision to disqualify counsel is reviewed for an abuse of discretion. *Rivera*, 2013 IL 112467, ¶ 37. A trial court abuses its discretion when its "decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.*

¶ 20 The grounds for the trial court's disqualification of defendant's chosen counsel was the length of time it took the defense to answer discovery and file any *Lynch* motion. The record reveals that during the January 20, 2017 court date, Jackson informed the trial court that he anticipated filing a *Lynch* motion and answer discovery within 30 days, on February 24, 2017. But Jackson did not comply with the February 24 filing date. Later on May 1, the trial court set May 24, 2017, as the date the defense was to answer discovery and offered to set a different date, one selected by Jackson. But Jackson refused. Following another contentious exchange, the trial court disqualified Jackson as defendant's chosen counsel. We do not doubt that the judge was properly motivated by a desire to advance the case to trial, not only to control his docket, but particularly in light of defendant's pleas for help because he claimed he was being tortured in jail. Those concerns were certainly valid, but must be weighed against defendant's constitutional right to the assistance of counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 144; *Ortega*, 209 Ill. 2d at 358.

¶ 21 Although the trial judge believed Jackson was engaging in dilatory practices and failed to make reasonable efforts to expedite litigation, Jackson represented that he was acting in good faith with reasonable diligence and consistent with defendant's best interests by gathering information vital to defendant's self-defense claim. Yet, the transcripts reveal that Jackson refused to divulge anything of substance regarding the results of his investigation and, much to the trial judge's understandable frustration, refused to set any firm date for filing his answer to discovery and *Lynch* motion. Defendant's brief on appeal reveals much more of the investigative

steps that Jackson performed than represented to the trial judge, particularly in obtaining Mixon's health records that established a history of violent behavior and angry moods. Based on the investigation conducted by Jackson, it appears that on remand Jackson should be in a position to timely file an answer to discovery and a *Lynch* motion.

¶ 22 Because defense counsel had the responsibility to answer discovery within a reasonable time (Ill. S. Ct. R. 413(d) (eff. July 1, 1982)), the prudent course of action would have been for the trial court to order discovery by a firm date and then set a date for trial. In the event that defense counsel failed to comply with the discovery order and disclose pertinent information, the trial court had the discretion to permit discovery of material and information not previously disclosed, grant a continuance, exclude the evidence, or enter such other order as it deemed just under the circumstances. Ill. S. Ct. R. 415(g) (eff. Oct. 1, 1971); see also *People v. Spicer*, 158 Ill. App. 3d 699, 703 (1987) (the trial court may properly exclude substantive evidence of an affirmative defense that was not disclosed to the prosecution during discovery). And given the steps defense counsel took to fully develop a self-defense theory, the record does not support defense counsel's disqualification on the basis that his performance was so inadequate that defendant was not receiving the level of assistance guaranteed by the sixth amendment. See *Burnette v. Terrell*, 232 Ill. 2d 522, 535 (2009) (recognizing that defense counsel whose performance was inadequate may provide grounds for dismissal). As noted, the trial court was understandably and justifiably frustrated with defense counsel's persistent refusal to move the case toward retrial, but based on the limited record before us, defense counsel demonstrated a commitment and dedication to his representation of defendant.

¶ 23 Moreover, in disqualifying Jackson, the judge expressed concern about Jackson's unprofessional conduct in court and the risk that he may act inappropriately in front of the jury,

but the trial court’s “inherent power to control its courtroom and maintain proper decorum extends no further than its ability to find someone in contempt.” *In re General Order of March 15, 1993*, 258 Ill. App. 3d 13, 17 (1994); see *Beale v. Edgemark Financial Corp.*, 297 Ill. App. 3d 999, 1010 (1998) (the Illinois Supreme Court and the Attorney Registration and Disciplinary Commission have the exclusive authority to discipline and sanction the unprofessional conduct of attorneys admitted to practice in Illinois). Disqualification of Jackson based on how he *may* act in the future in front of the jury was premature. In the event counsel acted inappropriately during trial or the proceedings leading to trial, the trial court had to the power, among other things, to hold counsel in contempt if his behavior so warranted.

¶ 24 It is well-settled that disqualifying defendant’s choice of counsel is a drastic measure because it destroys an established attorney-client relationship and bars a defendant from retaining counsel of choice. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997); *Pedersen & Houpt, P.C. v. Summit Real Estate Group, LLC*, 376 Ill. App. 3d 681, 685 (2007); *In re Estate of Klehm*, 363 Ill. App. 3d 373, 377 (2006). Although there are circumstances justifying the disqualification of defendant’s chosen counsel, the record here does not support such a drastic measure. Consequently, we reverse the trial court’s order disqualifying Jackson and remand for retrial with Jackson representing defendant.

¶ 25 Reversed and remanded.