FOURTH DIVISION
June 29, 2017

No. 1-15-0884

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.
	)	
v.	)	No. 76 I6 0092
	)	
FREDDIE MARTIN,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's ruling granting the State's motion to dismiss defendant's *pro se* petition for postconviction relief; defendant was not deprived of his right to appointed counsel because defendant voluntarily, knowingly, and intelligently waived his right to appointed counsel; defendant forfeited any objection to the oral motion to dismiss when the court offered to grant defendant a continuance to respond to the motion and defendant instead requested the court rule on the motion based on his oral response.

¶ 2 Following a jury trial in 1976, defendant, Freddie Martin, was found guilty of burglary, armed robbery, and two counts of murder for killing Catherine and Herbert Alferink. Defendant was given an indeterminate sentence requiring him to serve a minimum of 150 years to a maximum of 450 years in prison for each count of murder. Defendant filed a direct appeal, and this court affirmed his conviction and sentence in 1979. *People v. Martin*, 80 Ill. App. 3d 281 (1979). In 2011, defendant filed his petition for postconviction relief *pro se*, arguing the judgment was void because the sentencing statute he was sentenced under was void because it allowed the sentencing judge to increase the minimum sentence for murder by relying on facts that were not submitted to the jury and proven beyond a reasonable doubt. The sentencing scheme at the time defendant was sentenced provided that the minimum sentence was for murder was 14 years, but allowed the judge to increase the minimum sentence imposed if the judge determined that the nature and circumstances of the offense and history and character of the defendant warranted a higher minimum sentence. Ill. Rev. Stat. 1975, ch. 38 ¶¶ 1005-8-1 (replaced by 730 ILCS 5/5-8-1 (eff. Jan 1, 2017)). After defendant's petition advanced to second-stage proceedings, the court appointed the Public Defender's office to represent defendant. The appointed assistant Public Defender eventually filed a written motion to withdraw as counsel, which the court granted when defendant informed the court he had no objection to her withdrawal. The State then made an oral motion to dismiss defendant's petition on grounds it was untimely filed. The court offered defendant a continuance to respond. Defendant responded orally to the motion, and encouraged the court to decide the oral motion to dismiss based on his oral arguments that the judgment was void because the sentence was void. The court granted the State's motion to dismiss, finding the judgment was not void and that defendant's claim only raised a sentencing issue. For the following reasons, we affirm the

judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Catherine and Herbert Alferink were killed in January 1976. Their adult daughter came to visit on the morning following their deaths to find the Alferink's home in disarray and the elderly couple on the kitchen floor. Herbert's body was lying face down while Catherine's body was lying on her back with a knife protruding from her chest. Catherine died from five stab wounds in her chest and Herbert died from two stab wounds in his chest. In March 1976, defendant was charged with two counts of murder, two counts of armed robbery, two counts of burglary, two counts of aggravated battery, and one count of attempt (murder). A jury found defendant guilty of burglary, armed robbery, and the murders of Catherine and Herbert Alferink. Defendant was given an indeterminate sentence of 150 to 450 years for murder, 20 to 60 years for armed robbery, and 3 to 9 years for burglary, the sentences to run concurrently.

¶ 5 Defendant filed his postconviction petition in March 2011. The Clerk of the circuit court of Cook County file-stamped the petition in April 2011, however, defendant never received a file-stamped copy. Defendant again submitted his petition and the Clerk file-stamped this petition on October 5, 2011, though defendant informed the Clerk via mail that he had not received file-stamped confirmation of receipt of his petition. On October 28, 2011, the circuit court docketed defendant's petition and, pursuant to the Post-Conviction Hearing Act, appointed counsel to represent him. 725 ILCS 5/122-4 (West 2010). An assistant Public Defender was appointed to represent defendant. On June 21, 2012, counsel wrote to defendant to inform him that she reviewed the statute he was charged under, and that she was reviewing his file. The assistant Public Defender explained that defendant was not given an enhanced sentence under the statute because he committed two murders, and the maximum statutory penalty was death. On

July 2, 2012, defendant wrote back to counsel to argue his theory of why the sentencing statute he was sentenced under was void.

¶ 6 Defendant wrote that because the death penalty was unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972) when defendant was sentenced, and because the statute he was sentenced under provided for a maximum penalty of death, the statute was unconstitutional. Defendant thus concluded he was punished for a crime he was not charged and found guilty beyond a reasonable doubt of committing. The assistant Public Defender attempted to convey to defendant that he was not charged with violating an unconstitutional law, and that defendant's sentence was not unconstitutional because the statute allows the trial court to increase the minimum sentence and he did not receive the maximum sentence which was death. Instead defendant received a *de facto* life sentence. Defendant also argued his sentence was void because the minimum time he was required to serve on his indeterminate sentence exceeded the statutory minimum, and that he was unconstitutionally given an "enhanced" sentence. In *Apprendi v. New Jersey*, the Supreme Court of the United States held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). However, as defendant's counsel replied to defendant, defendant was not given a sentence that exceeded the statutory maximum sentence for two murders, which a jury found him guilty of.

¶ 7 Defendant then wrote to the Public Defender on July 9, 2012, to tell the Public Defender that his assistant Public Defender was providing, in his opinion, ineffective assistance of counsel. Lester Finkle, chief of the Legal Resources Division, wrote back to defendant on July 17, 2012. Finkle attempted to convey to defendant that defendant's legal theory was without merit, and that

defendant's appointed assistant Public Defender would remain as his attorney as she was providing quality legal representation. On August 28, 2012, defendant wrote a motion requesting removal of his appointed legal counsel, which he filed on September 7, 2012. On September 7, the trial court indicated defendant sent a motion requesting the removal of the assistant Public Defender and appointment of a bar attorney. On October 5, 2012, the assistant Public Defender informed the court that defendant did not want the Public Defender's office representing him. The court writ defendant in for the following status date. On November 16, 2012, the following status date, the assistant Public Defender appeared to inform the court that defendant changed his mind, that he wished to have her continue to represent him, and then defense counsel scheduled a further status date. The court stated:

> "Defendant not needed if he's here. Is he here?
>
> The Deputy Sheriff: He's here.
>
> The Court: He is?
>
> The Deputy Sheriff: Yes.
>
> Ms. Walls: We discontinued his writ on the last court date.
>
> The Court: This is Freddie Martin. By agreement, 3/1/13. Writ will be discontinued, however, okay."

¶ 8 The assistant Public Defender proceeded with her representation. She communicated with defendant and researched the arguments he wanted her to present. After some months of working with defendant, she eventually reached an impasse with him. Defendant insisted that counsel present his argument that the sentencing statute he was sentenced under was void, but she tried to explain to defendant his argument was without merit.

¶ 9 On September 5, 2014, the assistant State's Attorney brought to the trial court's attention

how defendant had filed motions *pro se* even though he was being represented by counsel:

> "Ms. Walls: My understanding he wants to go *pro se* again, and we have already kind of been through this with him as far as going *pro se*. If you want to bring him in to admonish him again regarding *pro se* or you just want to go forward.
>
> Ms. Foster: I think we should bring him in.
>
> The Court: We will bring him in."

The court agreed to bring defendant in for admonishment and continued the matter until October 24, 2014. Defendant was unable to be brought from the Illinois Department of Corrections on that date due to medical treatment and being too ill to travel. The State requested November 7, 2014 for the next proceeding. At the November 7 proceeding, the assistant State's Attorney informed the court that defendant was still too ill to travel, and the matter was continued. On January 23, 2015, the State informed the court that defendant was finally well enough to travel, and he could be brought to court on February 13, 2015.

¶ 10 On February 13, the trial court proceeded to inquire whether defendant wished to have the assistant Public Defender continue representing him:

> "The Court: Okay. So you don't have a problem with her withdrawing from the case?
>
> The Defendant: No, I don't.
>
> The Court: Who is going to represent you then?
>
> The Defendant: I -- I can't represent myself because I'm not in physical health to do it. I'm under health care right now. I just went through -- I've got cancer.

The Court: Okay. Who is going to represent you then?

The Defendant: Well, I would want the Court to appoint me a Bar Association Attorney, other than the Public Defender's Office, because I filed a complaint with her boss.

* * *

The Court: First of -- First of all, let's just stop right there. This one practices in front of me on a weekly basis. For you to call her incompetent lets me know that you don't understand what the law is.

The Defendant: Well --

* * *

The Court: You're not -- You don't want to represent yourself, and I'm not going to appoint a Bar Association lawyer to represent you, so we're kind of like at a crossroad. We turn left or we turn right? You tell me which direction we're going to turn and what we're going to find once we make that turn?

* * *

The Court: Right. So that's not -- that's down the road. I'm talking about right now. Are you going to represent yourself?

The Defendant: I can't because I'm not -- I'm not well enough to do it, your honor."

At this point in the proceedings, the assistant Public Defender informed the court she could file a written motion to withdraw as defendant's counsel. In response, defendant asked the court: "Well, can I speak with her, then, ten minutes, please?" Which the court allowed and concluded the proceedings. The matter was continued until February 27, 2015.

¶ 11 At the next court date on February 27, 2015, defense counsel informed the trial court that she filed a motion to withdraw as defendant's counsel. Defendant indicated that he wanted the court to appoint other counsel, and the court reminded defendant that it would not do so.

"The Defendant: Your Honor, you know, if you deny that motion, I have a motion here in opposition to her motion. I'm not asking that she not be taken away from the case, but the context that she used, I don't believe that's accurate, because it's false information.

The Court: You disagree with how she's handling the case?

The Defendant: Yes, I do.

The Court: Okay. And what law school did you go to?

The Defendant: Excuse me?

The Court: I said what law school did you go to?

The Defendant: I understand my constitutional rights under the Sixth Amendment.

The Court: I know. That's not the question. You have not gone to law school?

The Defendant: No, I have not.

* * *

The Defendant: I object to the motion, the structure of the motion, because she's giving misinformation about it.

The Court: Okay, fine. Her motion wants to withdraw. Do you disagree with the conclusion that she be allowed to do that?

The Defendant: I want her to leave the case, but the context that she's

using to get off the case --

The Court: You either agree or disagree with her motion.

The Defendant: I want her to be removed from the case.

* * *

The Court: Do you object to her motion to withdraw?

The Defendant: Yes, I do.

The Court: Okay, then she'll stay as your attorney.

The Defendant: Your Honor, listen. What I'm saying is --

The Court: Pass the case. I don't listen to anybody. I warned you about it before. You don't talk to me like that. We are going to pass the case. When you start showing me some respect, then we can talk."

After defendant was recalled by the court, the court inquired whether he had any objection to the assistant Public Defender's motion to withdraw.

"The Defendant: Yes, sir.

The Court: Okay. So what do you want to do?

The Defendant: I object to the context of it. I don't object to -- I object to the context of the motion, the premises that she's using to file it.

The Court: Okay. I understand. You've told me that before. Do you object to the conclusion, the conclusion being that she wants to withdraw as your attorney?

The Defendant: I want her to withdraw.

The Court: Okay. So the motion to withdraw counsel is granted. Now, you have two options. You tell me what option you want. Either you will be

hiring an attorney or you will be representing yourself. I've had an opportunity, by the way, to read all of these motions you've been filing throughout the years. This isn't something I'm just being thrown at. So I've read all of these things a long time ago, ruled on them, whatever. So you tell me now are you going to represent yourself or are you going to hire an attorney? I am not appointing a private attorney to represent you. Out of those two options, what do you want to do?

The Defendant: I'm not going to represent myself, sir, and I guess you have the two options. You can do what the Court feels is --

The Court: It's not what I feel is proper. I've read all of your motions, okay, and you've told me that you had no objection to your attorney withdrawing. Fine. Your attorney now has withdrawn. Now, you have two options. It's not open for discussion. You're either going to represent yourself or you or your family is going to hire a private attorney to represent you. Out of those two options, what do you want to do?

The Defendant: I'm not going to represent myself, your honor, and I'm not going to hire an attorney. I haven't got the financial means to do so.

The Court: Okay. Then I guess we'll take this matter off call then.

The Defendant: I would like to file a motion --

The Court: No. If you're filing a motion, that means you're representing yourself.

The Defendant: Well, I object to you ruling with respect to her withdrawing from the case.

The Court: You told me you had no objection to her withdrawing.

* * *

The Defendant: I'm not going to represent myself. I haven't got the knowledge to do that.

The Court: You know what they call this? A standstill. I'm not going to appoint an attorney to represent you. I've read your motions. I don't think they're valid to pay taxpayers money to represent you. Now, you had no objection to your attorney withdrawing. She's withdrawn. I've granted her motion. So you tell me what you want to do.

The Defendant: I'm not going to represent myself. You do what you feel is necessary. If you feel you have to give me --."

At this point, the assistant State's Attorney interjected to remind the court that the postconviction petition was still pending, and she made an oral motion to dismiss. Defendant responded by objecting to the State's motion:

"The Defendant: That's not the issue that I'm arguing, and I object to your motion to --

The Court: You know what you're doing, Mr. Martin? You're doing a lot of objecting. You know who does a lot of objecting? Somebody representing themselves.

The Defendant: I'm saying she's not reading the whole motion. That's not what the issues are about.

The Court: I've read your motions. I've read the postconviction. I've read your motions. I read everything that's been filed in this case.

The Defendant: Well, sir --

The Court: So what I'm going to have you do is, I'm going to continue this case, and then you address the issue of timeliness. If you want to do it in writing, you can do it in writing. If you want to make it orally, you can make it orally. But you can address the issue of timeliness of this postconviction. Okay?

The Defendant: We can do it either like this. I say the issues at that time, they were void. Okay? I'm saying what the Judge did at that time, he didn't have the authority to do it. So, you know, like I said, you know, make your ruling.

The Court: Okay. The motion to dismiss is granted. The judgment was not void. This is a sentencing issue."

This appeal followed the trial court's dismissal of defendant's postconviction petition.

¶ 12 ANALYSIS

¶ 13 Defendant raises two arguments on appeal: first, that the trial court deprived him of his statutory right to counsel by failing to ensure his waiver of counsel was voluntary, knowing, and intelligent; and second, that the trial court violated his due process rights by granting the State's oral motion to dismiss when the State never provided defendant with written notice of its motion.

¶ 14 Commensurate with Illinois' statutory right to appointed counsel in postconviction proceedings is a defendant's ability to waive that right, so long as the defendant's waiver is voluntary, knowing, and intelligent. *People v. Redd*, 173 Ill. 2d 1, 21 (1996) ("the defendant's waiver of counsel must be voluntarily, knowingly, and understandingly made. [Citations.] Before a criminal defendant's waiver of counsel will be deemed valid the trial court must determine that defendant has the ability to understand the proceedings, that he knows the significance and consequences of his decision, and that his waiver was not coerced."). We

review the trial court's ruling to grant defense counsel's motion to withdraw for abuse of discretion. *People v. Baez*, 241 Ill. 2d 44, 106 (2011) ("This court will not disturb the trial court's decision to remove counsel absent an abuse of discretion.").

¶ 15 Whether defendant's procedural due process rights were violated when the court granted the State's oral motion to dismiss defendant's postconviction petition turns on whether defendant was provided notice of the motion to dismiss and a meaningful opportunity to present objections. *People v. Cardona*, 2013 IL 113076, ¶ 15; cf *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). Whether the State violated defendant's due process rights presents this court with a question of law, and is therefore reviewed *de novo*. *People v. Stapinkski*, 2015 IL 118278, ¶ 35.

¶ 16 Defendant Voluntarily, Knowingly, and Intelligently Waived Appointed Counsel

¶ 17 While the sixth amendment guarantees indigent criminal defendants the right to appointed counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)), in postconviction proceedings indigent defendants are only entitled to appointed counsel under the Post-Conviction Hearing Act after their case advances to second-stage proceedings. 725 ILCS 5/122–4 (West 2010).

> "The right to counsel in postconviction proceedings is wholly statutory. [Citation.] Therefore, a petitioner is entitled only to the level of assistance required by the Act. [Citation.] The Act provides for a 'reasonable' level of assistance. [Citation.] To assure the reasonable assistance required by the Act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. [Citation.] Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional

> rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. [Citation.]" *People v. Perkins*, 229 Ill. 2d 34, 42, 890 (2007)

¶ 18 Commensurate with a criminal defendant's right to counsel is a defendant's right to self-representation. Defendant has a right to proceed *pro se*, but must first knowingly and intelligently relinquish his right to counsel. *Baez*, 241 Ill. 2d at 115-16; *People v. Gray*, 2013 IL App (1st) 101064, ¶ 23. Defendant's waiver of counsel cannot be ambiguous; defendant's choice must be clear and unequivocal. *Gray*, 2013 IL App (1st) 101064, ¶ 23. A court's determination of whether defendant clearly and unequivocally waived counsel turns on whether the court finds "defendant truly desires to represent himself and has definitively invoked his right of self-representation. [Citation.] We must indulge every reasonable presumption against waiver of the right to counsel. [Citation.]" *Id*. While a defendant's decision to waive counsel may be unwise or foolish, if the court is satisfied defendant freely, knowingly, and intelligently chose to proceed *pro se*, then it must accept that decision. *People v. Lego*, 168 Ill. 2d 561, 563-64 (1995). When ruling on defendant's waiver of counsel, the court must determine whether defendant's waiver is voluntary, knowing, and intelligent:

> "Ordinarily a waiver is an intentional relinquishment or abandonment of a known right or privilege. [Citation.] Although a defendant need not possess the skill and experience of a lawyer in order to choose self-representation competently and intelligently, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citations.] This requirement of

> knowing and intelligent choice calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. [Citations.] 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. [Citation.]" *Id*. at 564-65.

As noted above, we will not disturb the trial court's finding that defendant's waiver of counsel was voluntary, knowing, and intelligent without finding an abuse of discretion. *Baez*, 241 Ill. 2d at 106. A court abuses its discretion if its ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 19 The trial court did not abuse its discretion by granting the assistant Public Defender's motion to withdraw her representation because defendant did not object to the motion; it is not the case that no reasonable person could take the view that defendant voluntarily, knowingly, and intelligently agreed to waiver of his appointed counsel. Defendant filed a motion on September 7, 2012 requesting removal of the assistant Public Defender. Defendant appeared at the next status date, November 16, 2012, where defense counsel informed the court that defendant changed his mind and wished for her to continue representing him. Counsel continued to work with defendant until she reached an impasse in her representation after she persistently attempted to inform defendant that the legal theory he wanted her to argue on his behalf was without merit. On September 5, 2015, the State brought to the court's attention that defendant filed a *pro se* motion despite still being represented by appointed counsel. Defendant again appeared in court on February 13, 2015. At this hearing the court questioned defendant concerning defendant's

wish to have the assistant Public Defender removed and informed defendant that the court would not appoint other counsel if defendant chose to have his appointed counsel withdraw. The court further informed defendant that he would then have to either proceed *pro se* or hire an attorney at his own expense. Defendant requested a ten minute meeting with defense counsel to confer. The court provided defendant with two weeks. On February 27, 2015, defendant's appointed counsel filed a motion to withdraw as defendant's counsel, and the court again informed defendant that if defendant wished for his counsel to withdraw the court would not appoint defendant other counsel at the State's expense. In a vexing exchange, defendant informed the court of his desire to have the assistant Public Defender withdraw as he had filed motions in the past to have her removed and she did not want to go forward with his legal theory. Defendant, however, maintained that he did not want to proceed *pro se* because he was not healthy enough and not sufficiently versed in the law, and that he wanted to have the court appoint him counsel. Finally, defendant withdrew his objection to the motion to withdraw, and the court removed defendant's appointed counsel. The court repeatedly warned defendant that it would not appoint alternate counsel, and defendant consulted with his appointed counsel multiple times concerning his desire to retain her representation. After defendant's initial request to have the assistant Public Defender removed, defendant withdrew that motion after consulting with her. When defendant proved hesitant about agreeing to the assistant Public Defender's motion to withdraw on February 13, 2015, the court ensured defendant was provided with two weeks to further confer with her. After allowing defendant ample time to consult with the assistant Public Defender and again informing defendant of the consequences, defendant still wished for the assistant Public Defender to withdraw. We cannot say that no reasonable court would find that defendant's waiver of his right to appointed counsel was voluntary, knowing, and intelligent.

¶ 20 Because defendant had the benefit of postconviction counsel and consulted her about her continued representation after the first time he filed a motion to have the assistant Public Defender removed, defendant knew the duties of appointed postconviction counsel. "A defendant who has been represented by an attorney for a period of time is more likely to understand the workings of the system than a defendant who first appears in court." *People v. Young*, 341 Ill. App. 3d 379, 387 (2003). In *Young*, the defendant was charged with aggravated battery for spitting on a correctional institution employee. *Id*. at 381. At the defendant's first appearance the trial court explained the nature of the charge against him and that he was entitled to an attorney; at the defendant's request, the court appointed the Public Defender to represent the defendant. *Id*. Following a jury trial, the defendant was found guilty of aggravated battery and the court sentenced the defendant to a three year term to run consecutively to the sentence he was already serving. *Id*. at 381-82. The Clerk of the circuit court filed a notice of appeal on the defendant's behalf, and the defendant filed a motion to reduce his sentence which the appellate court dismissed and remanded for further posttrial proceedings. *Id*. at 382. The defendant then filed, *pro se*, two motions requesting appointment of new counsel based on the defendant's allegation he had been provided with ineffective assistance of counsel. *Id*. After finding the defendant's counsel had not been ineffective, the *Young* court turned to defendant's waiver of counsel. *Id*. at 386. The court recognized how the defendant retained a Constitutional right to counsel in posttrial proceedings, but that the defendant waived his right to appointed counsel, and the trial court was not required to provide defendant with Rule 401(a) admonishments. *Id*. at 386-87. The court found that defendant not only "already knew everything a Rule 401(a) admonishment would have told him," but because defendant had the benefit of counsel representing him, the defendant understood the implication of waiving his right to counsel. *Id.* at

387.

¶ 21 Here, defendant argues that *Young* is inapposite and his waiver of counsel was not knowing and intelligent due to the trial court's failure to admonish defendant concerning the full extent of the right he was waiving. Defendant maintains that knowing and intelligent waiver of postconviction counsel requires the trial court to ensure defendant understands appointed counsel's duties under Supreme Court Rule 651(c) (amended Feb. 6, 2013) because postconviction counsel's defined obligations under that rule differ from the requirements of Rule 401(a) (eff. July 1, 1984). However, defendant provides no authority supporting his argument that a knowing and intelligent waiver of counsel requires the court to admonish defendant as to all of an attorney's obligations under Rule 651(c). Defendant's position is that it was necessary for the trial court to ensure that defendant understood the different burdens of proof at second-stage and third-stage evidentiary hearings. The State maintains that *Young* directly applies: defendant was already convicted and sentenced when he appealed from second-stage postconviction proceedings and would already know the information in a Rule 401(a) admonishment; as a result, the trial court need not admonish criminal defendant's prior to waiver of counsel in postconviction proceedings. Even if the waiver of counsel occurs in postconviction proceedings, the court is under no less an obligation to determine whether defendant's waiver was voluntary, knowing, and intelligent. *Baez*, 241 Ill. 2d at 115-16; *People v. Campbell*, 224 Ill. 2d 80, 87 (2006). Moreover, the requirements of Rule 401(a) differ from appointed counsel's duties under Rule 651(c), meaning that even if defendant knew all the information contained in a 401(a) admonishment, such an admonishment would not sufficiently inform defendant of his counsel's duties in postconviction proceedings. Nonetheless, the record reveals it was not unreasonable to find that defendant knowingly and intelligently made his decision to voluntarily

waive his right to appointed counsel because defendant was sufficiently apprised of the right he was waiving.

¶ 22 Though the record does not reveal the trial court admonished defendant it is not unreasonable to conclude defendant's waiver of counsel was knowing and intelligent. We do not hold that a court must issue formulaic admonishments, though the trial court is not absolved of the requirement to determine if defendant's waiver of counsel is knowing and intelligent. *Baez*, 241 Ill. 2d at 115-16; *Lego*, 168 Ill. 2d at 564-65; *Gray*, 2013 IL App (1st) 101064, ¶ 23. Here, we cannot say it was unreasonable to find that defendant understood the implications of his waiver of appointed counsel. The trial court repeatedly inquired whether defendant wished to relinquish counsel or if he wished to lodge an objection against the assistant Public Defender's motion to withdraw, thus assuring itself of his voluntary relinquishment of appointed counsel. Similarly, the *Young* court not only decided that the defendant knew the information of a Rule 401(a) admonishment, but also that because the defendant had been represented by counsel he understood the nature of the right he was forgoing. *Young*, 341 Ill. App. 3d at 387. "The criteria generally considered in making that decision include the defendant's age, level of education, mental capacity and prior involvement, if any, in legal proceedings." *People v. Davis*, 169 Ill. App. 3d 1, 6 (1988). Here, defendant had been in multiple legal proceedings, and most importantly was able to consult with counsel concerning whether he should waive his right to appointed counsel. Early in the postconviction proceedings defendant requested to have counsel removed, but he thought better and did not waive his right to counsel in 2012 after he consulted with her. Moreover, in the 2015 proceeding, defendant requested additional time to consult with counsel about whether he should waive his right to counsel. The court provided him with two weeks. Defendant had experience in legal proceedings, repeated communications with his

attorney and her department concerning his theory of his case, and defendant had repeated consultations with the assistant Public Defender concerning whether he should waive his right to counsel.

¶ 23 Additionally, the State argues defendant displayed a level of legal sophistication allowing the trial court to draw an inference of knowing and intelligent waiver. The State points out the determination of whether a defendant knowingly and intelligently waived counsel examines defendant's background, experience, and conduct during the proceedings. *People v. Kidd*, 178 Ill. 2d 92, 105 (1997). The State further contends that because defendant displayed a level of legal sophistication during the proceedings, defendant's experience and conduct during the proceedings indicated defendant knowingly and intelligently waived his right to appointed counsel. We agree. We note that defendant displayed legal sophistication in understanding that the statutory limitations on filing a postconviction petition would not bar his petition if the underlying judgment is void. When the State made its oral motion to dismiss based on the timeliness of defendant's petition, defendant responded orally in court and without legal representation that the judgment was void and that his petition was therefore timely. We thus find that based on the level of legal sophistication defendant displayed, and defendant's conduct during the proceedings, defendant knowingly and intelligently waived his right to appointed counsel.

¶ 24 A trial court abuses its discretion when it makes a finding no reasonable court would make. *Hall,* 195 Ill. 2d at 20. The court repeatedly gave defendant opportunities to consult with appointed counsel specifically on the issue of whether defendant should waive his right to counsel. We cannot say no reasonable judge would have entered the same finding as the trial court. Therefore, we cannot say the trial court's decision to grant the assistant Public Defender's

motion to withdraw as counsel was an abuse of discretion.

¶ 25 Defendant Forfeited Objections to the State's Oral Motion to Dismiss

¶ 26 After defendant's appointed counsel withdrew from the case, the State made an oral motion to dismiss on the grounds defendant's petition was untimely.

¶ 27 Under Illinois' Post-Conviction Hearing Act, unless the defendant is alleging actual innocence, "no proceedings under this Article shall be commenced more than 6 months from the date for filing a *certiorari* petition." 725 ILCS 5/122-1(c) (West 2010). According to the Rules of the Supreme Court of the United States:

> "a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Sup. Ct. R. 13 (eff. Feb. 16, 2010).

Here, defendant filed his petition more than thirty years after his conviction was affirmed by this court. On appeal, defendant does not attack the merits of the trial court's decision, but argues the State deprived him of his procedural due process rights because the State filed an oral motion to dismiss defendant's postconviction petition instead of a written motion. The State argues defendant forfeited any objections to the oral motion, and that at the hearing defendant encouraged the court to rule on the oral motion and response, and cannot now object on appeal. We agree with the State that defendant forfeited his objection to the State's oral motion to

dismiss and cannot now raise objection on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 28 Initially we note that while defendant stated he objected to the motion to dismiss, when offered a continuance to respond to the motion, defendant rejected the continuance. Instead, defendant responded orally to the merits of the State's motion, arguing the State's position that his petition was not timely filed had no merit because the judgment defendant was attacking was void (a void judgment can be attacked at any time either directly or collaterally). *People v. Thompson*, 2015 IL 118151, ¶ 30. Defendant encouraged the court to rule on the oral motion and stated his response would not change if he had a continuance. Defendant actively requested the court rule on the motion even though the court granted him time to prepare a response. He asked the court to make its ruling. "[A]n accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error." *People v. Segoviano*, 189 Ill. 2d 228, 241 (2000). We cannot allow defendant to take advantage of the courts by requesting a ruling on his petition and then failing to accept the consequences by asking a court of appeal to undo his decision only after it hits home that his claim was meritless. *Id*. We find defendant forfeited any objections he had to notice of the State's oral motion to dismiss.

¶ 29 Forfeiture aside, the case law submitted by defendant does not support his arguments that he was denied due process. On appeal defendant argues the Post-Conviction Hearing Act requires dismissal motions to be in writing and cannot be made orally, relying on the holding in *People v. Jackson*, 2015 IL App (3d) 130575. The State argues the language in *Jackson* specifically requiring a written motion was *dicta*.

¶ 30 In *Jackson*, the defendant filed a *pro se* postconviction petition five years after his

conviction, which the court summarily dismissed. *Id.* ¶¶ 5-6. Almost three years after this dismissal, the defendant filed a motion for leave to file a successive postconviction petition. *Id.* ¶ 7. After the trial court granted the defendant's motion, the defendant was appointed counsel. *Id*. For two and a half years, although the defendant was represented, the defendant persisted in filing *pro se* motions along with requests for appointment of new counsel. *Id.* ¶ 8. Finally, the defendant's postconviction counsel filed a "Motion to Dismiss/Leave to Withdraw." *Id.* ¶ 9. Defendant was present for the hearing on this motion and the State presented no objection. *Id.* ¶ 10. The court then dismissed the defendant's complaint. *Id.* ¶ 11. We reversed and remanded for further proceedings. *Id.* ¶ 24. The *Jackson* court found it particularly problematic that the defendant's counsel presented a combined motion to withdraw as counsel and to have the defendant's case dismissed - the defendant's counsel was effectively arguing against the defendant's interest despite still representing the defendant. *Id*. ¶ 16. The State never filed its own motion to dismiss, despite the requirement that "the State must file a motion to dismiss the petition." *Id*. ¶ 18. The motion to dismiss was not before the court, only the motion to withdraw was before the court. *Id*. ¶ 20. The defendant was deprived of any meaningful opportunity to be heard on the motion to dismiss.

¶ 31 Here, the State made the oral motion to dismiss on the ground that defendant's petition was not timely filed. Defendant did not accept the trial court's offer of a continuance. Instead, he orally responded that his petition should be heard because the judgment he was attacking was void. After orally presenting his relatively sophisticated argument, defendant told the court his response to the motion to dismiss would not change if he had more time and he encouraged the court to make its ruling based on the State's oral motion and his oral response. While the defendant in *Jackson* had to deal with counsel that argued against his interest, here defendant's

counsel filed a written motion to withdraw and did not argue for dismissal of defendant's case. *Jackson* is also distinguishable because here defendant not only waived his objection to the State's oral motion, but he responded orally and requested the court rule on the oral motion and his oral response.

¶ 32 Defendant further argues his procedural due process rights were violated because he was not provided notice of the State's motion to dismiss. Defendant relies on *Merneigh v. Lane*, 87 Ill. App. 3d 852 (1980) to argue that the failure to provide him written notice of the motion to dismiss his petition violated his procedural due process rights. We find defendant's reliance *Merneigh* inapt. In *Merneigh*, the plaintiff was a prisoner who filed a *pro se* complaint for *mandamus* to compel the defendant prison warden to provide him additional law library passes. *Id*. at 853. Three months after filing his complaint, the plaintiff wrote a handwritten note to the Clerk of the court inquiring about his case. The Clerk informed the plaintiff that his complaint had been filed, but that no summons had been issued. *Id*. at 854. One month later, an assistant State's Attorney filed a motion to dismiss the plaintiff's complaint because the plaintiff had been provided the same amount of time in the law library as the other inmates. The court dismissed the plaintiff's complaint that same day. *Id*. The very next day, the plaintiff filed a "Motion to Expedite Issuance of Summons and to Set Hearing Date," and made a demand for personal appearance at court. *Id*. Because his complaint was dismissed, the plaintiff's next appearance was on appeal, where the plaintiff argued he had been deprived of due process of law when his complaint was dismissed without being provided notice of the motion to dismiss or opportunity to object. *Id*. The *Merneigh* court reversed the trial court and remanded for further proceedings because the plaintiff had not been provided notice of the motion to dismiss his complaint, nor was the plaintiff provided an opportunity to be heard or object to the motion. *Id*. at 855.

Merneigh is distinguishable from this case. In *Merneigh*, the defendant did not have notice of the motion to dismiss until after the case was dismissed. Here, defendant was present when the motion was made and the court offered defendant an opportunity to prepare a response by continuing the case. Defendant orally responded the State's motion had no merit and defendant encouraged the court to rule on the motion immediately. Unlike in *Merneigh*, where defendant did not learn of the existence of a motion until after his case was dismissed, here defendant was made aware of the motion before the court ruled on it, and he had an opportunity to be heard. The court provided defendant an opportunity to prepare a response, an opportunity defendant waived. It was defendant's choice to refuse the continuance and to request the court to rule on the merits of the motion to dismiss with his oral response. Therefore, defendant forfeited any objection to the State's failure to provide him with written notice of the motion to dismiss.

¶ 33 In sum, defendant voluntarily, knowingly, and intelligently waived his right to appointed counsel. Defendant understood the implications of forgoing appointed counsel and that he would not be appointed alternate counsel. Defendant chose to proceed nonetheless. Defendant forfeited any objections to the lack of notice of the oral motion to dismiss and the State's failure to file a written motion.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.