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1. [\*People v. Rodriguez, 2015 IL App \(1st\) 142057-U\*](#)

**Client/Matter:** -None-



## People v. Rodriguez

Appellate Court of Illinois, First District, Fourth Division

December 10, 2015, Decided

No. 1-14-2057

### Reporter

2015 IL App (1st) 142057-U \*; 2015 Ill. App. Unpub. LEXIS 2743 \*\*

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICARDO RODRIGUEZ, Defendant-Appellant.

**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\(e\)\(1\)](#).

**Prior History:** **[\*\*1]** Appeal from the Circuit Court of Cook County. No. 96 CR 2723-01. Honorable Maura Slattery Boyle, Judge Presiding.

*People v. Rodriguez*, 311 Ill. App. 3d 1070, 766 N.E.2d 689, 2000 Ill. App. LEXIS 1770, 262 Ill. Dec. 769 (Ill. App. Ct. 1st Dist., 2000)

**Disposition:** Reversed and remanded.

### Core Terms

trial judge, postconviction, trial court, disqualifying, postconviction proceedings, ethics, representing defendant, attorneys, defense counsel, leave to appeal, proceedings, assigned, appeals, abused, driver

**Judges:** PRESIDING JUSTICE McBRIDE delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

**Opinion by:** McBRIDE

### Opinion

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

### ORDER

**[\*P1]** *Held:* The trial court erred in disqualifying defendant's counsel to represent him in postconviction proceedings and on remand the case is to be assigned to a different trial court judge.

**[\*P2]** Defendant Ricardo Rodriguez appeals from the trial court's order disqualifying The Exoneration Project at the University of Chicago Law School (the Project) from representing him during postconviction proceedings. Defendant filed a petition for leave to appeal pursuant to [Supreme Court Rule 306\(a\)\(7\)](#) (*Ill. S. Ct. R. 306(a)(7)* (eff. July 1, 2014)), which this court granted. On appeal, defendant argues that the trial court abused its discretion in denying him his counsel of choice and asks this court to remand with an order to allow the Project to represent defendant and to assign his case to a different trial court judge.

**[\*P3]** Following a bench trial, defendant was found guilty of the first **[\*\*2]** degree murder of Rodney Kempainen, the attempted first degree murder of Rodolfo Zaragoza, and the aggravated discharge of a firearm in the direction of Zaragoza occurring on December 16, 1995. Aurelio Martinez testified that at the time of the shooting he was standing next to Kempainen near Hamlin and North Avenue in Chicago. It was dark outside, but lit by street lights. He observed a blue two-door car stop in front of them 8 to 10 feet away. The passenger window was down, there were no passengers, and Martinez was able to see the driver. He identified defendant as the driver in court. Defendant then fired at least three to four shots at him and Kempainen.

**[\*P4]** Later in December, he viewed a photo array and pointed out defendant, but "was not too sure about it." A couple days later he viewed a lineup, he recognized defendant and "was sure about his identification." *People v. Rodriguez*, No. 1-97-4361, [published in table format at 311 Ill. App. 3d 1070, 766 N.E.2d 689, 262 Ill. Dec. 769] (March 15, 2000) (unpublished order under [Supreme Court Rule 23](#)), slip op. at 4.

[\*P5] Rodolfo Zaragoza testified that he was crossing North Avenue near Hamlin when he heard gunshots from Hamlin. He then saw a blue two-door car turn toward him. He stated that the driver tried to hit him, but he avoided the car. The driver then [\*\*3] stopped and Zaragoza saw the driver, who he identified in court as defendant. Defendant then fired two shots at him. Zaragoza later identified defendant in a photo array and in a lineup. *Id. at 4-5.*

[\*P6] Defendant was subsequently convicted and the trial court sentenced defendant to consecutive terms of 60 years for first degree murder and 30 years for attempted first degree murder. In his posttrial motion for a new trial, defendant included an affidavit from Zaragoza in which he recanted his identification of defendant. The trial court denied defendant's motion. On appeal, defendant argued that the trial court erred in denying his motion to quash arrest and suppress evidence, he was denied effective assistance of counsel, the State failed to prove him guilty beyond a reasonable doubt, and that his consecutive sentences were improper. The reviewing court affirmed defendant's conviction, but held that the imposition of consecutive sentences was improper and remanded for resentencing. *Id. at 14.*

[\*P7] In June 2004, defendant filed his initial postconviction petition, alleging (1) ineffective assistance of trial and appellate counsel, (2) a *Brady* violation, and (3) police misconduct, including that Zaragoza asserted [\*\*4] that Detective Reynaldo Guevara told Zaragoza who to pick out in the lineup. The petition was docketed in August 2004. In June 2007, the State filed a motion to dismiss defendant's postconviction petition. In July 2007, the trial court conducted a hearing on the State's motion, granting the motion for all claims except the police misconduct. The trial court granted a third stage evidentiary hearing on the claim of police misconduct.

[\*P8] In 2010, the case was reassigned to the current trial court judge. In August 2011, defendant filed his exhibits to his postconviction petition, including testimony and affidavits relating to Detective Guevara. In August 2012, the State filed its response to defendant's exhibits. No further action occurred on the case until 2013.

[\*P9] According to an affidavit from defendant's sister Maria Rodriguez-Lopez, the family had been paying the legal fees for defendant's postconviction counsel, but in 2011, the family no longer had the money to pay the attorney's legal fees. In late July 2013, Rodriguez-Lopez contacted Russell Ainsworth of the Project because he had worked on cases involving Detective Guevara. The Project is a lawyer-supervised law school clinic operating [\*\*5] out of the Mandel Legal Aid Clinic at the University of Chicago Law

School and offers *pro bono* postconviction representation to people claiming they were wrongfully convicted of crimes they did not commit. Rodriguez-Lopez met with Ainsworth and another attorney, Tara Thompson, a few days later. Prior to contacting the Project, Rodriguez-Lopez stated that she and defendant contacted several other attorneys, including groups that offer *pro bono services*, but none responded. On September 17, 2013, defendant mailed a letter to his former postconviction attorney stating that he wanted to change attorneys, listing Thompson at the University of Chicago Law School as his new attorney. Also in September 2013, Ainsworth and Thompson sought leave of the trial court to file an appearance on defendant's behalf. At this point, the trial judge issued a subpoena to the Illinois Department of Corrections regarding defendant. The judge received defendant's visitor log as well as audio recordings of defendant's telephone conversations.

[\*P10] On March 2014, the trial judge met with defendant's prior postconviction counsel *ex parte* in chambers and asked him questions about defendant's decision to change attorneys. [\*\*6] Postconviction counsel stated that he first learned of his termination of representation by defendant on September 17, 2013. Prior counsel stated that he was told the family felt bad that they could not pay his legal fees and felt the Project was the way to go. Counsel said he gave the case files to Thompson and went over it with her. He voiced no objection to defendant's request to be represented by the Project. Later in proceedings before all parties, the trial judge indicated her concerns that ethical rules had been violated in regard to representation of defendant when an attorney talked to another attorney's client. During these proceedings, the State voiced no objection to the Project representing defendant. At the next court date on March 14, 2014, the trial judge stated that she had learned that Thompson visited defendant in August 2013 without prior counsel's knowledge. On that date, the judge stated that prior counsel would remain the attorney of record.

[\*P11] On March 28, 2014, defendant filed a motion for substitution of judge transferring this case and allowing the Project to file an appearance.<sup>1</sup> The motion asserted that defendant's "unopposed motion to substitute counsel should [\*\*7] have been granted without complication."

[\*P12] In an April 2014 letter to the Attorney Registration and Disciplinary Commission (ARDC), the judge stated that she observed that Thompson visited defendant and signed in as legal counsel on two occasions, August 9, 2013, and

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<sup>1</sup> Although not clear from the record on appeal, it appears that this motion was transferred to another judge for a hearing and was denied.

September 12, 2013, without notifying defendant's postconviction counsel. The judge also stated it appeared that defendant's family met with Ainsworth and Thompson "at a meeting where other people were invited and who may have relatives currently incarcerated. It is unclear who arranges these meeting[s] but in any event these two attorneys were at these meetings." The judge wrote that she "indicated to the parties its concern of the lack of notification to the current representing attorney for visitation and the manner in which the new lawyers were introduced to defendant's family." The judge disclosed that she believed she had a duty to report this incident under *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790, 127 Ill. Dec. 708 (1988). In May 2014, Thompson received a letter from the ARDC indicating that it had considered the trial judge's report and "have determined [\*\*8] that no further action by this office is warranted."

[\*P13] In June 2014, the trial judge disqualified the Project from representing defendant, ordered prior counsel to remain on the case, stating that it is "well within [her] full discretion to say no that an individual will not be filing an appearance and the attorney of record will continue with the case." Ainsworth asked the trial judge for the basis of her denial, the judge responded, "Because the case has been set for litigation and it is."

[\*P14] This appeal followed.

[\*P15] Defendant filed a petition for leave to appeal pursuant to *Supreme Court Rule 306(a)(7)*, which this court granted. Defendant argues that the trial judge abused her discretion in disqualifying the Project from representing defendant in his postconviction proceedings. The State filed an answer to the petition, contending that this court lacks jurisdiction to consider the appeal. If the court has jurisdiction, the State maintained that defendant does not have a constitutional right to counsel of choice in postconviction proceedings, and even if defendant does, the trial court has the discretion to have the case proceed in a timely and appropriate manner. The State did not file a response brief on appeal, [\*\*9] but requested to rely on its answer to the petition for leave to appeal, which this court allowed.

[\*P16] We first address the State's argument that this court lacks jurisdiction to consider defendant's appeal. Defendant filed his petition for leave to appeal pursuant to *Supreme Court Rule 306(a)(7)*. *Rule 306(a)(7)* allows for a petition for leave to appeal to this court "from an order of the circuit court granting a motion to disqualify the attorney for any party." *Ill. S. Ct. R. 306(a)(7)* (eff. July 1, 2014). As the State points out, *Rule 306* falls under the section detailing the civil appeals rules.

[\*P17] We note that *Supreme Court Rule 651(d)* provides,

"The procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals, as near as may be." *Ill. S. Ct. R. 651(d)* (eff. Feb. 6, 2013). However, "[a] post-conviction proceeding is not part of the criminal process. Rather, it is a collateral attack on the judgment of conviction and is civil in nature." *People v. Johnson*, 191 Ill. 2d 257, 270, 730 N.E.2d 1107, 246 Ill. Dec. 642 (2000). While *Rule 651(d)* states that postconviction proceedings fall under criminal appeal rules "as near as may be," we recognize that postconviction proceedings fall between criminal and civil proceedings. Under the criminal appeal rules, *Supreme Court Rule 604(g)* offers a similar basis for an interlocutory appeal to *Rule 306(a)(7)*, although with a slight limitation. [\*\*10] *Rule 604(g)* states: "The defendant may petition for leave to appeal to the Appellate Court from an order of the circuit court granting a motion to disqualify the attorney for the defendant based on a conflict of interest." *Ill. S. Ct. R. 604(g)* (eff. Feb. 6, 2013). The State asserts that *Rule 604(g)* does not apply in this case because no ruling was made on a motion to disqualify an attorney based on a conflict of interest.

[\*P18] However, this case is before this court under unusual circumstances. Defendant's initial postconviction petition has been pending in the trial court since 2004, and has been awaiting a third stage evidentiary hearing since 2007. Defendant had the assistance of a private attorney throughout his postconviction proceedings, but has not been able to afford attorney fees since 2011. Defendant and his family sought *pro bono* representation and the Project agreed to represent defendant. A motion seeking leave to appear was filed in September 2013. No action was taken by the State in response to the request, and the State voiced no objection on the record in proceedings before the trial judge. However, the trial judge *sua sponte* disqualified the Project from representing defendant after pursuing an ethics report to [\*\*11] the ARDC. We find that under these particular circumstances the effect of the trial judge's ruling was a disqualification of the Project as defendant's attorneys based upon a perceived conflict of interest. We also note that any error in citing *Rule 306(a)(7)*, rather than *Rule 604(g)* is of no consequence. "It is well settled that where the deficiency in the notice of appeal is one of form only and not of substance, the appellate court is not deprived of jurisdiction." *VC&M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 33, 991 N.E.2d 323, 372 Ill. Dec. 16; see also *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 211, 670 N.E.2d 632, 218 Ill. Dec. 910 (1996) (appellant's "citation to the wrong rule was nothing more than harmless surplusage"). "The relevant question in this case is not whether [defendant] invoked the correct rule in his notice of appeal. Instead, the question is whether there is a rule that provides this court with jurisdiction over the appeal." *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 31, 979 N.E.2d

[383, 365 Ill. Dec. 779](#); see also *In re D.D.*, [212 Ill. 2d 410, 416-17, 819 N.E.2d 300, 289 Ill. Dec. 143 \(2004\)](#) (finding appeal perfected and jurisdiction proper despite appellant citing rule for civil appeals rather than criminal appeals in case involving delinquent minor). Reading [Rules 306\(a\)\(7\), 604\(g\)](#), and [651\(d\)](#) together, we conclude that the language "as near as may be" gives us jurisdiction to consider the disqualification of the Project from representing defendant. For all of these reasons, we hold that this court has jurisdiction, and we now **[\*\*12]** turn to the merits of defendant's appeal.

**[\*P19]** Defendant argues that the trial court erred in disqualifying the Project and depriving defendant of the counsel of his choosing. The State contends that defendant does not have a constitutional right to counsel of choice because he is seeking postconviction relief. While it is true that a defendant in postconviction proceedings does not have a *sixth amendment* right to counsel, only a statutory right to counsel ([725 ILCS 5/122-4](#) (West 2012)), defendant in this case is not seeking an appointment of counsel under a constitutional right to counsel. Rather, defendant has been represented by private counsel throughout his postconviction proceedings, but he can no longer afford that attorney. Defendant is not asking the court to appoint an attorney under the Post-Conviction Hearing Act, but has found new representation that has agreed to represent him free of charge and seeks leave for the Project to appear on his behalf. Defendant is asserting that the trial court abused its discretion in disqualifying his counsel of choice from representing him and, therefore, he has been denied his right to counsel of choice.

**[\*P20]** "The *sixth amendment of the United States Constitution* guarantees a criminal defendant the right to the assistance **[\*\*13]** of the counsel of his choice, but that right is subject to certain limits." *People v. Ortega*, [209 Ill. 2d 354, 358, 808 N.E.2d 496, 283 Ill. Dec. 530 \(2004\)](#) (citing *Wheat v. United States*, [486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 \(1988\)](#)). A trial court's decision to disqualify counsel must be affirmed unless there was an abuse of discretion. *Ortega*, [209 Ill. 2d at 359](#). "Generally, a court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *Id.* "[A] trial court may exercise its discretion to deny a defendant's right to counsel of choice only if it could reasonably find that defense counsel has a specific professional obligation that actually does conflict or has a serious potential to conflict with defendant's interests." *Id. at 361*.

**[\*P21]** "The trial court "must recognize a presumption in favor of defendant's counsel of choice."" *Id.* (quoting *People*

*v. Holmes*, [141 Ill. 2d 204, 223, 565 N.E.2d 950, 152 Ill. Dec. 268 \(1990\)](#), quoting *Wheat v. United States*, [486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 \(1988\)](#)). "The question is whether the interests threatened by the conflict or potential conflict are weighty enough to overcome the presumption." *Id.* "A court should seek to fairly consider all the interests that are affected by a conflict in a given case." *Id. at 362*.

**[\*P22]** In the instant case, the trial judge *sua sponte* disqualified the Project, defendant's counsel of choice, nine months after the request for leave to appear had been filed and following the **[\*\*14]** judge's own inquiry into alleged ethics violations. The record shows that the basis of the trial judge's ethics concern was that Thompson met with defendant twice in prison before prior counsel had been notified that defendant wanted new representation and without informing prior counsel of the visits as well as meetings between Ainsworth and Thompson and defendant's family, possibly attended by other individuals. The trial judge did not refer to any specific rule alleged to be violated under the Illinois Rules of Professional Conduct in the record or in her letter to the ARDC.

**[\*P23]** In response to the judge's inquiry, the Project referred the trial judge to [Rule 4.2 of the Illinois Rules of Professional Conduct](#) of 2010. [Rule 4.2](#) provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." [Ill. R. Prof. Conduct \(2010\) R. 4.2](#) (eff. Jan. 1, 2010). Comment 4 to [Rule 4.2](#) clarifies, "Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in **[\*\*15]** the matter." *Id.* It is undisputed that the Project was not representing another party to defendant's case. The ARDC found that no ethics violation was raised and closed the matter.

**[\*P24]** After the resolution of the ARDC report, the trial judge refused to allow the Project to represent defendant in his postconviction proceedings, significantly a third stage evidentiary hearing on a claim of police misconduct. The reason given by the trial judge was that the case was "set for litigation." While it is "within the trial court's discretion to determine when defendant's right interferes with the orderly process of judicial administration" (*People v. Antoine*, [335 Ill. App. 3d 562, 580, 781 N.E.2d 444, 269 Ill. Dec. 647 \(2002\)](#)), the particular circumstances of this case show that the proceedings were delayed by an ethics inquiry undertaken by the trial judge. The Project did not seek a continuance or to

delay proceedings. Moreover, the extended delay in considering defendant's postconviction petition of more than a decade is counter to the notion of an "orderly process of judicial administration." Absent any conflict of interest or ethics violation, we find that the trial judge abused her discretion in disqualifying the Project from representing defendant in postconviction proceedings. **[\*\*16]** Accordingly, we vacate the trial judge's order disqualifying the Project to represent defendant and it is granted leave to appear as defendant's counsel.

**[\*P25]** Defendant also asks this court to remand with instructions for the case to be assigned to a different trial judge. Given the particular circumstances of this case in which the trial judge engaged in an ethics inquiry of defendant's counsel that was submitted to the ARDC, we find that the case would be better served if assigned to a new trial judge on remand. Accordingly, we remand the cause to the presiding judge of the criminal court, with the direction that the case be assigned to a different trial judge.

**[\*P26]** Based on the foregoing reasons, we reverse the order denying leave of The Exoneration Project to appear as counsel for defendant. The cause is remanded to the presiding judge of the criminal court, with directions that it be assigned to a different trial judge.

**[\*P27]** Reversed and remanded.