

No. 1-08-2408

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 94 CR 2450
	)	
KENNETH LEWIS,	)	Honorable
	)	Bertina E. Lampkin
	)	and Thomas A. Hett,
Defendant-Appellant.	)	Judges Presiding.

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PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

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**O R D E R**

*HELD:* This court lacks jurisdiction over defendant's untimely appeal of the dismissal of his forensic DNA testing petition. There is insufficient evidence of the circuit court's bias, or appearance of bias, against defense counsel to warrant reversal of the dismissal of his post-conviction petition. That petition does not merit further proceedings because an erroneous jury instruction was harmless due to overwhelming evidence.

Following a 1994 jury trial, defendant Kenneth Lewis was convicted of aggravated criminal sexual assault and home invasion and was sentenced as a habitual criminal (720 ILCS 5/33B-1 *et seq.* (West 2008)) to natural life imprisonment. We affirmed on direct appeal. *People v. Lewis*, No. 1-94-1290 (1997) (unpublished order under Supreme Court Rule 23). Defendant's 2000 *pro se* petition for relief from judgment was dismissed *sua sponte* in 2000, which we affirmed, and his 2002 *pro se* post-conviction petition was summarily dismissed in 2002. *People v. Lewis*, No. 1-00-3002 (2001) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the 2008 dismissal, upon the State's motion, of his 1999 post-conviction petition as supplemented by counsel. He contends that he showed a lack of culpable negligence in the untimely filing of his petition and that he stated a meritorious claim that one of his jury instructions -- Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4<sup>th</sup> Ed. 2000) ("IPI 3.15") -- was erroneously given. Defendant also appeals from the 2008 denial of his 2006 petition for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure. 725 ILCS 5/116-3 (West 2008). He contends that we should remand for further proceedings on both petitions because the court appeared to be partial and expressed bias against post-conviction (PC) counsel.

The evidence at trial was that, in March 1991, defendant and two others forcibly removed Shon Taylor from an apartment, took him to another apartment in the same building occupied by Linda S., Marvin S., and several children, and kicked in the door of that apartment. In that apartment for over an hour, defendant menaced Marvin with a gun and instructed his co-offenders to beat Taylor and Marvin while he sexually assaulted Linda, then put a gun in Taylor's mouth and threatened to kill him. Defendant repeatedly demanded the return of his money and drugs, and at the end of the incident he and his co-offenders left the apartment with two coats, a video recorder, and a stereo system. At trial, Linda, Marvin, and two children identified defendant as one of the assailants. A police detective corroborated that the apartment's front door was damaged. An emergency-room physician testified that Marvin had a lump on the back of his head that he attributed to being struck with a gun and that Linda had an abrasion consistent with forced sex and seemed emotionally distressed when she described her sexual assault. Defendant testified that he was in a bar and a restaurant with a friend, and then at his sister's home, at the time of the home invasion, and a police detective testified that he gave a similar account after his arrest. While defendant denied the charges against him, he admitted to being a high-ranking member of a street gang

and that Taylor, a member of a rival gang, owed his gang money and \$1,000 worth of drugs at the time of the home invasion.

The jury instructions included IPI 3.15, listing factors to be considered in evaluating identification testimony, which was given without objection with "or"s between the factors. The jury found defendant guilty of two counts of aggravated criminal sexual assault and three counts of home invasion. Based on his criminal history, rendering him a habitual criminal, defendant was sentenced on March 11, 1994, to natural life imprisonment.

On direct appeal, defendant contended that he was denied a fair trial when (1) the court told the jury how to conduct its deliberations and (2) the prosecutor made improper closing arguments. He also contended that he should be convicted of only one count each of aggravated criminal sexual assault and home invasion, a point the State conceded. Lastly, defendant contended *pro se* that his right to a speedy trial had been violated. Except for vacating the redundant counts, we affirmed. Regarding closing arguments, we found that one of the State's comments may have been improper but was not reversible error because the evidence against defendant was overwhelming.

In his 2000 petition for relief from judgment, defendant argued that his convictions should be vacated because his arrest was based upon one of the vacated redundant counts. The circuit court rejected this claim, and we affirmed. In his 2002 PC

petition, defendant argued that delivery of the IPI 3.15 instruction with "or"s between the factors was erroneous. In summarily dismissing the petition, the circuit court noted that defendant did not object to the instruction at any time before his petition and found that any error in the jury instruction was harmless due to the overwhelming evidence of defendant's guilt.

The instant *pro se* PC petition was received by the court in June 1999. While it contained certifications and affidavits dated March 1998, the petition was preceded by motions and letters in early 1999 unsuccessfully seeking additional time to file the petition. The petition raised various claims including that trial counsel should have allowed defendant to submit to DNA testing, that the prosecutor made improper closing arguments, and that defendant's right to a speedy trial had been violated.

The trial court summarily dismissed the petition as untimely filed, but we remanded for further proceedings. *People v. Lewis*, No. 1-99-3163 (2003) (unpublished order under Supreme Court Rule 23). On remand, the court appointed PC counsel from the public defender's office and the State filed a motion to dismiss the petition as untimely.

PC counsel filed a supplemental petition in 2006, arguing that the delivery of IPI 3.15 with "or"s between the factors was reversible error and not harmless due to the closely-balanced evidence. The supplemental petition also argued that defendant

lacked culpable negligence for the delay in filing his *pro se* petition and was presenting a claim of actual innocence. In support of the culpable negligence issue, the supplemental petition included an May 1999 letter from defendant explaining why he thought the petition was timely. Also attached was a letter from the Department of Corrections (Department) listing the periods when defendant's prison was in lockdown from 1991 to 2001 but also stating that there was no indication in Department records that defendant was in segregation and that legal mail is collected even from segregation or during a lockdown. PC counsel certified, pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), that the petition as supplemented adequately presented defendant's claims.

The State amended its motion to dismiss to argue that defendant had failed to demonstrate a lack of culpable negligence for his late filing. Specifically, the Department letter attached to the supplemental petition established that he was not in segregation in prison and that he was allowed to send mail even during segregation or lockdown. Also, his claim of actual innocence was not a freestanding claim based on newly-discovered evidence. Substantively, the State argued that the IPI 3.15 instruction with "or"s was harmless error because the evidence of defendant's guilt was overwhelming.

In May 2008, the court heard arguments on the motion to dismiss. During the hearing, as the State was arguing, the court twice directed unknown persons in the courtroom "to be quiet because I am trying to hear the people who are talking up here" and to stop "talking while this young lady [the prosecutor] is trying to argue in front of me," threatening contempt on the latter occasion. During PC counsel's argument, the court asked him several questions about defendant's lockdown before allowing him to proceed at length with his argument.

On August 18, 2008, the court granted the State's motion and dismissed defendant's petition as untimely filed, expressly finding no exception for lack of culpable negligence or a claim of actual innocence. Regarding the latter, the allegedly newly-discovered evidence was in police reports and thus available at trial. The court also found that defendant's claims were barred by *res judicata* and waiver and that any error in the IPI 3.15 instruction was harmless due to overwhelming evidence.

In November 2006, while the instant PC petition was pending, PC counsel filed a section 116-3 petition for DNA testing. In July 2007, the State and PC counsel informed the court that they would present an agreed order for DNA testing and sought a two week continuance. The court said that it "will not continue it if you all don't get this by the next date" because "this is taking too long for an agreed order" but without further argument

granted the two-week continuance. The court entered the agreed order at the next hearing, July 31, 2007, and continued the case to October 2007. In October 2007, the State informed the court that the police had destroyed the kit, and the court ordered the police to provide more information, continuing the case to late November. The police informed the court that the kit had been destroyed in September 1994 and provided a copy of a page from a police property inventory ledger to that effect.

In November 2007, upon learning of the police information, PC counsel asked for a continuance to late December to consult with the public defender's forensic division. While the State orally moved to dismiss the section 116-3 petition, and the court noted that "if there's nothing to test, you certainly can't test it," the court granted the requested continuance. Due to PC counsel's eye surgery, the case was further continued to late January 2008, at which time PC counsel asked for a one-month continuance. The court noted the State's oral motion to dismiss and stated that "I'm not going to continue it again. I have to have your position or I will rule on the next date," but granted the one-month continuance. At the February 21 hearing, PC counsel told the court that his associate who was assisting on the DNA matter "had to be hospitalized recently" and her cases assigned to other associates. The court expressed surprise that an attorney other than PC counsel was going to respond to the

State's oral motion, noted that "if the evidence is destroyed, it doesn't take a rocket scientist to know there is no testing that can be done," and continued the case for a week.

At the February 28 hearing, PC counsel told the court that he needed an associate's help in preparing a motion regarding the destroyed kit and sought a one-week continuance "for final argument." The court noted that it had been five months since the State's oral motion to dismiss and told PC counsel that it would grant that motion if he did not file a response by the next court date in March. The court also said:

"every single case that's on the post-conviction unit with the public defender's office they have an excuse. I have cases pending for two years, I can't get a response from the post-conviction unit. It makes no sense."

At the next hearing, on March 20, 2008, PC counsel appeared with the public defender himself and orally moved to seek more information from the police on the destruction of the kit "to show that there has been no bad faith in the destruction of this evidence." The court noted that it had been continuing the case for a defense response to the motion to dismiss, not a new discovery motion, and refused to consider an oral motion. The court continued the case a week for a written motion. When the

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State asked for the hearing to be on a particular date because the prosecutor was going to be on vacation, the court agreed. When PC counsel noted that he had a medical appointment that day, the court refused to change the hearing date.

In March 2008, defendant filed a motion seeking to direct the police to provide all documents relating to the existence and destruction of the kit. The State asked to respond orally, but the court directed the State to file a written response. The State did so, arguing that the police had provided sufficient documentation and asking the court to dismiss the section 116-3 petition.

On April 9, 2008, the court heard arguments on the defense discovery motion and the State motion to dismiss. The court then found that the original police documentation from 2007 "convinced the court" that the kit had been destroyed. The court also noted that, in the judge's experience hearing criminal cases since 1974, there were no orders to preserve evidence at the time of defendant's trial and evidence was routinely destroyed after conviction, so that "there is no evidence \*\*\* whatsoever that anything was done incorrectly." The court denied the defense discovery motion and dismissed the section 116-3 petition.

Defendant filed a notice of appeal on August 18, 2008, that included the summary dismissal of his PC petition that day and the April 2008 dismissal of his section 116-3 petition.

Before we address the merits of this appeal, we must consider the State's contention that we lack jurisdiction to consider defendant's contentions regarding the DNA claim because his appeal from the disposition of his section 116-3 petition was untimely filed. A petition for forensic testing under section 116-3 is not a continuation of the underlying criminal case nor part of any other post-conviction proceeding but a separate action that is independently appealable. *People v. Permanian*, 381 Ill. App. 3d 869, 872 (2008), citing *People v. Savory*, 197 Ill. 2d 203, 210-11 (2001); see also *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007) (section 116-3 petition for forensic testing is a legislatively-created right). Stated another way, the dismissal of the section 116-3 petition was not an order precedent to the dismissal of the PC petition and is not encompassed by the timely appeal of the latter. Under Supreme Court Rule 606 (eff. Mar. 20, 2009) and Rule 651 (eff. Dec. 1, 1984), the section 116-3 dismissal had to be appealed within 30 days; that is, in May 2008. The August 2008 notice of appeal was untimely as to the section 116-3 petition, and we thus dismiss defendant's appeal insofar as he seeks relief for that dismissal. That said, defendant's claim of judicial bias is based on comments by the court in the section 116-3 and PC proceedings. To the extent that he is using statements in the former as evidence to support relief on the latter, we shall consider them.

On appeal, defendant contends that the dismissal of his petitions should be reversed because of bias and the appearance of bias by the judge presiding in his case against PC counsel and the public defender's office in general.

A judge's bias or prejudice is shown where there is active personal animosity, hostility, ill will, or distrust towards the defendant or his counsel. *People v. Shelton*, 401 Ill. App. 3d 564, 583 (2010). Allegations of judicial bias or prejudice must be viewed in context; that is, evaluated in terms of the judge's specific reaction to the events taking place. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Opinions formed by a judge based on facts introduced in, or events occurring in the course of, the current or prior judicial proceedings do not constitute a basis for a claim of bias or partiality unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible. *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010). Thus, judicial remarks critical or disapproving of, or even hostile to, counsel, the parties, or their cases generally do not support a bias or partiality challenge unless they reveal an opinion deriving from an extrajudicial source and displaying such a high degree of favoritism or antagonism that a fair judgment is impossible. *Estate of Wilson*, 238 Ill. 2d at 554. Similarly, a judge's display of displeasure or irritation with an attorney's behavior is not necessarily evidence of

judicial bias against counsel or his client. *Faria*, 402 Ill. App. 3d at 482. A judge is presumed to be impartial, and the defendant has the burden of establishing bias or prejudice. *Faria*, 402 Ill. App. 3d at 482; *Shelton*, 401 Ill. App. 3d at 583.

Here, most of the statements by the court asserted to be evidence of bias concern the efficient -- or perceived inefficient -- progress of defendant's section 116-3 petition, a legitimate concern for the circuit court. The hyperbole of the court in referring to delays by the public defender's office as a whole, rather than by PC counsel or in the instant case, strikes us as an expression of momentary frustration rather than some deep-seated bias against that office. Moreover, we do not see how the court's admonishments that the case proceed expeditiously prejudiced defendant. The court did not deny the continuances requested by PC counsel, except for a matter of one day. The court did not refuse to consider defendant's oral discovery motion regarding the DNA kit, despite understandable confusion over whether PC counsel was going to file a response to the State's motion to dismiss rather than a new motion, but merely insisted upon a written motion. Notably, the court similarly demanded that the State respond to the discovery motion in writing despite the State's desire to respond orally. The court gave PC counsel ample opportunity to argue the discovery motion once filed.

While the court found against defendant in the substance of the matter, the court correctly noted that a destroyed kit could not be subjected to DNA testing. Defendant challenges the court's basis for finding that the destruction was not done in bad faith and concluding that further discovery into the destruction was unnecessary. While defendant concedes that the court could properly recognize that the law had changed, he contends that the court could not base its decision on the judge's recollection of judicial and police practice. However, the line between what the law required or allowed and what the courts and police did in practice is not so clear to us as to constitute reversible error on a discovery motion. Moreover, the court's reliance on the judge's recollection does not strike us as evidence of bias or appearance of bias, which is the grave allegation defendant makes against the judge.

Defendant places significant weight on the treatment of PC counsel and the prosecutor during arguments on the motion to dismiss the PC petition, contrasting the court's admonishments to stop interrupting the prosecutor with the court's own questioning of PC counsel. However, not all interruptions are created equal. The difference between stopping irrelevant disruptions from the court gallery and the court asking relevant questions to counsel is palpable to attorneys and non-attorneys alike. The court did not admonish the gallery solely because it was the prosecutor who

was speaking, as defendant implies, but because it wanted to "hear *the people* who are talking up here" (emphasis added), and the prosecutor was speaking first because it was the State's motion. No admonishments of silence were given during PC counsel's arguments because further disruption was unlikely after the court's threat of contempt, which itself was reasonable given the earlier disruption. The questions asked of PC counsel were relevant and cogent, and they did not in the least deprive PC counsel of his opportunity to present his argument before and after the court's questions. See *Faria*, 402 Ill. App. 3d at 483 ("the trial court here did not make derogatory comments about defendant, did not cut short defense counsel's argument with a time limitation and did not show a prejudgment of the case before counsel concluded his argument.")

In sum, we find insufficient evidence of any bias or significant appearance of bias by the court against PC counsel or the public defender's office in general to warrant reversal of the dismissal of the PC petition.

Defendant also contends that his PC petition as amended stated a meritorious claim regarding the erroneous IPI 3.15 instruction with "or"s between the factors used in weighing identification testimony. The delivery of IPI 3.15 with "or"s is erroneous, but it may be harmless error where the evidence at trial was not closely balanced. *People v. Piatkowski*, 225 Ill.

2d 551, 565-67 (2007). Here, we found on direct appeal that the evidence of defendant's guilt was overwhelming -- that is, not closely balanced -- and the discrepancies noted by defendant do not persuade us to hold otherwise now. Moreover, such a claim cannot be raised in a collateral challenge where the defendant's direct appeal concluded before 2001, when the erroneous nature of IPI 3.15 with "or"s was recognized by this court. *People v. Chatman*, 357 Ill. App. 3d 695, 699-700 (2005). We therefore conclude that defendant's IPI 3.15 claim was not meritorious.

Lastly, defendant contends that the dismissal of his PC petition should be reversed because he showed a lack of culpable negligence.

Culpable negligence is greater than ordinary negligence and is akin to recklessness. *People v. Marino*, 397 Ill. App. 3d 1030, 1033 (2010). For example, delay in filing a PC petition may be excused when the petition is based on a new case that changes the law applicable to the defendant's claim, when a prisoner lacks access to legal materials because of segregation or prison lockdown, or when the defendant reasonably relies on the incorrect advice of appellate counsel. *Marino*, 397 Ill. App. 3d at 1033-34. However, citizens are presumptively charged with knowledge of the law. *Marino*, 397 Ill. App. 3d at 1035.

Here, it is at least arguable that defendant showed a lack of culpable negligence, in that he could send mail from prison

but did not necessarily have consistent access to legal reference materials. On the other hand, defendant's letter in support of the culpable negligence issue demonstrated a belief that his petition was not yet untimely when he filed it, when in fact it was untimely since March 1997, three years after his sentencing, due to a statutory amendment. Pub. Act 88-678 (eff. July 1, 1995) (amending 725 ILCS 5/122-1 (West 1996)). That said, unlike a petition at the first stage of post-conviction proceedings, which must rise or fall as an indivisible unit and cannot be subjected to partial summary dismissal (*People v. Sparks*, 393 Ill. App. 3d 878, 887 (2009), citing *People v. Rivera*, 198 Ill. 2d 364, 374 (2001)), the instant petition was dismissed at the second stage. Defendant has chosen to contend on appeal that one of his substantive claims is meritorious, and we have disposed of that claim above. We therefore see no reason to address whether defendant showed a lack of culpable negligence.

Accordingly, we dismiss for lack of jurisdiction defendant's appeal from the dismissal of his forensic DNA testing petition. The judgment of the circuit court is otherwise affirmed.

Dismissed for lack of jurisdiction in part and affirmed in part.