

2011 IL App (2d) 100173-U
No. 2-10-0173
Order filed August 2, 2011
Modified upon denial of rehearing October 19, 2011

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
SECOND DISTRICT

VINCENT BOGGAN,)	Appeal from the Circuit Court
)	of Lee County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-MR-40
)	
NEDRA CHANDLER, Warden, Dixon)	
Correctional Center,)	Honorable
)	Daniel A. Fish,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: Under the doctrine of collateral estoppel, plaintiff's *habeas corpus* claim was barred by the prior dismissal of his section 2-1401 petition: by the end of the *habeas* proceedings, the prior dismissal was final, as the potential for appellate review was exhausted; plaintiff was a party to the prior case; and the issue was identical.

¶ 1 This is an appeal by a *pro se* appellant—*habeas corpus* plaintiff Vincent Boggan—whose complaint the Lee County circuit court dismissed. The defendant, Nedra Chandler, warden of Dixon Correctional Center, asserts that Boggan's claim is barred by a prior judgment. We agree. Moreover, Boggan's claim fails on its merits. Accordingly, we affirm the dismissal.

¶ 2

I. BACKGROUND

¶ 3 On June 3, 2008, Boggan filed a three-count “Petition for Habeas Corpus” (properly, a complaint) in the Lee County circuit court. In the first count, the only one at issue here, he asserted that his armed robbery convictions in three Cook County cases, No. 88-CR-6841, No. 88-CR-6842, and No. 88-CR-6845, were void.

¶ 4 According to the allegations of fact in the complaint, Boggan was charged with armed robbery under four Cook County case numbers: No. 88-CR-6841, No. 88-CR-6842, No. 88-CR-6845, and No. 88-CR-6846, this last being the first case to go to trial. Judge Robert V. Boharic presided over the first trial. In each of the three later-trying cases, Boggan filed a motion under section 114-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1987, ch. 38, par. 114-5(c), now 725 ILCS 5/114-5(d) (West 2010)), to disqualify for cause Judge Boharic and another judge whom Boggan claimed was biased against him, Judge James M. Bailey. Nevertheless, Judge Bailey was the judge who heard each of the three motions. He denied all of them. As a result, Judge Boharic presided over the three later trials, each of which resulted in an armed robbery conviction for Boggan.

¶ 5 In the first count of his *habeas* complaint, Boggan argued that section 114-5 bars a “named” judge from ruling on cause for removal, so that Judge Bailey’s being the judge who ruled on his motions was improper. He further argued that the filing of the section 114-5 motions had stripped Judge Boharic of jurisdiction to act in the cases and prevented Judge Bailey from having jurisdiction to decide the motions. Thus, according to Boggan, Judge Bailey’s rulings on the motions were void and did not restore jurisdiction to Judge Boharic, with the result that the later three convictions were void.

¶ 6 The record shows that Boggan appealed from those three convictions; he argued, among other things, that the trial court had violated his due-process rights by improperly refusing to require the substitution of judge for cause. In the consolidated direct appeal, a First District panel held that the denials were proper. *People v. Boggan*, No. 1-89-1165 (1991) (unpublished order under Supreme Court Rule 23) (supplemental order on denial of rehearing). The appeal did not raise the issue of whether, under section 114-5, Judge Bailey could rule on a motion for substitution that named him as a biased judge.

¶ 7 His convictions sustained on direct review, Boggan filed in Cook County at least two pleadings initiating collateral attacks on his convictions. The proceedings on those pleadings are not a part of the record in this case. One of those pleadings was a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)). The trial court dismissed the petition, and Boggan's appeal of that dismissal was pending when he filed his *habeas* complaint.

¶ 8 In the *habeas* complaint, Boggan explicitly stated that the claim that he raised in the first count was the same as the claim that he raised in his section 2-1401 petition.

¶ 9 The warden moved to dismiss Boggan's complaint under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2008)). She asserted, among other things, that the claim in Boggan's first count was *res judicata* given that Boggan had argued on direct appeal that it had been error to deny the section 114-5 motions.

¶ 10 On October 16, 2008, the court granted the motion to dismiss. It ruled that the first count failed to state a claim: it reasoned that jurisdiction lies in the court, not in individual judges, so that a procedural error resulting in an improper selection of judges would not oust the court's jurisdiction. It ruled alternatively that, because the direct appeal established that the denial of

substitution was proper, the matter was *res judicata*. As to counts II and III, it ruled that Boggan had failed to state a claim cognizable under *habeas corpus*.

¶ 11 Boggan filed a timely motion to reconsider. The warden filed a response that included as an exhibit a First District order dated February 23, 2009, affirming the dismissal of Boggan's section 2-1401 petition (*People v. Boggan*, No. 1-06-1934 (2009) (unpublished order under Supreme Court Rule 23)). Court records show that the appellate court denied Boggan's petition for rehearing on March 17, 2009. The warden asserted (and court records further confirm) that Boggan did not file a petition for leave to appeal to the supreme court. The warden argued that the appellate court's decision was a further basis for deeming Boggan's claim to be barred. On December 22, 2009, the trial court denied Boggan's motion to reconsider; Boggan timely appealed.

¶ 12

II. ANALYSIS

¶ 13 In his appellate briefs, Boggan argues that the dismissal of his complaint's first count was error; he again contends that the fact that his section 114-5 motions were decided by a judge whom he named as biased meant that the resulting judgments were void. He did not initially raise any argument challenging the alternative basis for dismissal, *res judicata*. However, in reply to the warden's argument that the claim was barred by the judgment dismissing his section 2-1401 petition, Boggan asserts that the First District lacked jurisdiction to affirm the Cook County circuit court's dismissal of that petition. He claims that the appellate court had already dismissed the appeal for want of prosecution when it affirmed the dismissal. He does not challenge the dismissal of the second and third counts of his complaint.

¶ 14 We agree that the judgment dismissing the section 2-1401 petition barred the first count's claim. However, we deem that the bar is better classified as one of collateral estoppel rather than *res judicata*.

¶ 15 That a *res judicata* bar does not clearly apply is a result of the lack of identity between both parties to the section 2-1401 proceeding and both parties to the *habeas* proceeding.

“For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies.” *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390 (2001).

Boggan was a party to both relevant actions, but the warden is a party to this action only: the State was the respondent in the section 2-1401 proceeding. Of course, there exists an obvious possibility that the warden and the State are in privity. However, the warden has not addressed the point. In any event, given that the doctrine of collateral estoppel *does* clearly apply under the circumstances, we need not further address the existence of privity.

¶ 16 For collateral estoppel to apply, three basic conditions must be satisfied:

“(1) [A] court rendered a final judgment in [a] prior case; (2) the party against whom estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical with the one presented in the instant case.” *People v. Tenner*, 206 Ill. 2d 381, 396 (2002) (applying collateral estoppel when a postconviction petitioner had previously raised an issue in a prior postconviction petition and a federal *habeas corpus* petition).

“Additionally, ‘[f]or purposes of applying the doctrine of collateral estoppel, finality requires that the potential for appellate review must have been exhausted.’ ” *In re A.W.*, 231 Ill. 2d 92, 100 (2008) (quoting *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113 (1986)). Here, the circuit court of Cook County entered a judgment against Boggan in a prior case, that of the section 2-1401 petition. Proceedings on section 2-1401 petitions produce final judgments. See *Sarkissian v.*

Chicago Board of Education, 201 Ill. 2d 95, 101-02 (2002) (an order disposing of a section 2-1401 petition is a final order). The warden seeks to assert the estoppel against Boggan, a party in the prior case. (Given the similarity between the doctrines of *res judicata* and collateral estoppel, we give no significance to the warden's use of the less apt doctrine.) Finally, by Boggan's own allegation in the *habeas* complaint, the section 2-1401 petition made exactly the same argument as the first count of the complaint.

¶ 17 Although the potential for appellate review of the section 2-1401 dismissal was not exhausted when Boggan filed his complaint, it was when the trial court entered the last of the orders that we are reviewing. Under Illinois Supreme Court Rule 315(b) (eff. Oct. 15, 2007), a party has 35 days after the grant or denial of a petition for rehearing to file a petition for leave to appeal to the supreme court. The First District denied Boggan's petition for rehearing on March 17, 2009. The deadline for any petition for leave to appeal was thus April 21, 2009. Boggan did not file such a petition, so the potential for appellate review was then exhausted. As a result, on December 22, 2009, when the court denied the motion for reconsideration, collateral estoppel was a proper basis for the *habeas* dismissal.

¶ 18 Boggan argues that no final judgment exists because the appellate court lacked jurisdiction to affirm the section 2-1401 dismissal. He asserts that the court had already dismissed the appeal for want of prosecution when it issued the affirmance. Court records do not support that claim. Moreover, a dismissal of the appeal for want of prosecution would result in exhaustion of the potential for appellate review every much as did the affirmance.

¶ 19 Boggan has filed two motions seeking leave to supplement the record to show that the First District dismissed for want of prosecution the appeal of the dismissal of his section 2-1401 petition. Because the manner in which the potential for appellate review is exhausted is irrelevant to the

application of collateral estoppel, the documents that Boggan seeks to add to the record cannot affect the outcome here. We therefore deny his motions.

¶ 20 In a petition for rehearing, Boggan asserts that fundamental fairness requires us to relax the bar of collateral estoppel. Such a relaxation would not aid Boggan, as his voidness claim fails on the merits.

¶ 21 Initially, we note that we do not agree with the warden that the holding in *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002), eliminates *any* possibility of voidness claims other than those based on lack of personal or subject-matter jurisdiction. Post-*Belleville Toyota*, the supreme court has continued to apply the concept of special limits on jurisdiction—at least in the context of unauthorized sentences. *E.g.*, *People v. Whitfield*, 228 Ill. 2d 502, 511 (2007) (a sentence that does not conform to statutory requirements is void); *People v. Thompson*, 209 Ill. 2d 19, 23 (2004) (an unauthorized sentence is void, and so reviewable at any time); *People v. Harris*, 203 Ill. 2d 111, 119 (2003). However, because Boggan’s claim fails for other reasons, we need not here explore the bounds of voidness in criminal cases.

¶ 22 Boggan cites *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008), a First District case, and our decision in *People v. Bell*, 276 Ill. App. 3d 939, 946-47 (1995), in support of the proposition that, once a defendant has filed a section 114-5(d) motion for substitution, *any* action taken by *any* judge that the defendant seeks to disqualify is void. Boggan overstates the rule.

¶ 23 In *Bell*, we held that a judge named in a motion for substitution for cause that is properly brought lacks power to rule on that motion. *Bell*, 276 Ill. App. 3d at 946-47. *However*, we stated that there are instances “where a trial court need not transfer a motion for substitution of judges for cause to another judge.” *Bell*, 276 Ill. App. 3d at 947. Specifically, we referenced the following situations:

“*People v. Damnitz* (1994), 269 Ill. App. 3d 51, 55 (holding that trial judge did not err in refusing to transfer to another judge defendant’s motion for substitution of judge for cause where defendant failed to establish even a threshold basis for his substitution motion); *People v. Marshall* (1988), 165 Ill. App. 3d 968, 975 (holding that trial judge did not err in refusing to transfer to another judge defendant’s motion for substitution of judge for cause where defendant’s motion lacked specificity); *People v. Crete* (1985), 133 Ill. App. 3d 24, 29 (holding that trial judge did not err in refusing to transfer to another judge defendant’s motion for substitution of judge for cause where defendant’s motion was not made in good faith).”

¶ 24 In *People v. Johnson*, 159 Ill. 2d 97, 123 (1994), the supreme court held that “case law requires that motions brought pursuant to section 114–5(d) contain specific allegations” and that, “[i]f the allegations are not sufficient, [a] defendant is not entitled to a hearing before a different judge.” Of course, we follow *Johnson*. *People v. Flynn*, 341 Ill. App. 3d 813, 824 (2003). Additionally, where bias or prejudice is invoked as the basis for seeking substitution, it must usually stem from an extrajudicial source, *i.e.*, from a source other than from what the judge learned from his participation in the case before him. A judge’s previous rulings can almost never constitute a valid basis for a claim of judicial bias or partiality. See *In re Estate of Wilson*, 238 Ill. 2d 519, 554 (2010). A logical extension of these requirements is that any other judge also named in the motion loses the power to rule on the motion only if the motion makes a sufficient showing of *that* judge’s bias.

¶ 25 The record here shows that Boggan at least explained why he believed Judge Boharic was biased against him, but it shows no reason given by Boggan for thinking that *Judge Bailey* was biased against him. Consequently, Boggan has not shown us that he made a sufficient showing of

Judge Bailey's bias and his motion was therefore not properly brought. Thus, under the extension of the sufficiency requirement, Judge Bailey had the power to rule on Boggan's motion. Therefore, assuming that Judge Boharic had ever lost the power to hear the case, Judge Bailey's ruling that Judge Boharic would continue to be assigned to the case restored that power.

¶ 26 We deem wholly unpersuasive Boggan's assertion that Judge Bailey, by requesting that another judge hear the motion for substitution, created an absolute requirement that a judge not named in the motion hear the motion. Logic requires that the threshold-showing requirement apply equally to any named judge.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm the dismissal of Boggan's *habeas corpus* complaint.

¶ 29 Affirmed.