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2013 IL App (3d) 120469-U

Order filed December 3, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-12-0469
)	Circuit No. 04-CF-902
)	
LORENZO DAVIS, JR.,)	Honorable
)	Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Wright and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's amended postconviction petition without an evidentiary hearing, where defendant's claim that a special prosecutor should have been appointed failed to make a substantial showing of a constitutional violation.

¶ 2 Following a jury trial, defendant, Lorenzo Davis, Jr., was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)), and was sentenced to 65 years' imprisonment.

Defendant subsequently filed a postconviction petition, which the trial court dismissed in the

second stage of proceedings. On appeal, defendant argues his postconviction claim that a special prosecutor should have been appointed was sufficient to require an evidentiary hearing. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with two counts of first degree murder for shooting and killing his girlfriend Susan (Terronez) Burge on October 1, 2004. 720 ILCS 5/9-1(a)(1), (2) (West 2004). Following a jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)), and was sentenced to 65 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Davis, Jr.*, No. 3-06-0279 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 6, 2008, defendant filed a *pro se* postconviction petition. On October 23, 2008, the trial court found that defendant's petition presented the gist of a constitutional claim and docketed the petition for further review. Defendant was appointed postconviction counsel, who filed an amended petition on October 21, 2011.

¶ 6 On June 1, 2012, the trial court held a second-stage hearing for defendant's amended petition. Defendant was allowed to add an additional claim to his petition. The newly added claim alleged that Jeff Terronez, the State's Attorney at the time of defendant's case, was related by blood to the victim in defendant's murder trial. Defendant argued that this familial relationship created a conflict of interest, which required the appointment of a special prosecutor for defendant's case. While in prison, defendant learned that the victim was the daughter of Manuel Rocky Terronez. According to defendant, Manuel was the State's Attorney's uncle, and thus, the victim was the State's Attorney's first cousin.

¶ 7 In response, assistant State's Attorney John McCooley noted that he was the prosecuting attorney on defendant's case. He recalled the case well and confirmed that the victim's maiden name was Terronez. He informed the court that he was not aware of the familial relationship and it did not seem like anyone else knew of the relationship either. During the original proceedings, McCooley had asked the State's Attorney if the victim was of any relation to him. The State's Attorney told McCooley that the victim was of no relation to him, but noted that "Terronez is a popular name in Silvis, East Moline, and Moline. I've got cousins who have cousins who have cousins." McCooley then argued that even if the victim was related to the State's Attorney, defendant suffered no prejudice because McCooley would have tried the case the same even if they were related.

¶ 8 The court stated that Terronez was a very common name in the area. The court then asked how old the victim was. Based on McCooley's representation that the victim had teenage children, the court stated that the victim would likely be a granddaughter of Manuel. The court stated that even if the victim was a first or second cousin of the State's Attorney, it was insufficient to create a conflict of interest. The trial court denied defendant's amended petition. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 Defendant argues his postconviction allegation that the State's Attorney was a first cousin of the victim was sufficient to require an evidentiary hearing in order to determine whether there was a conflict of interest necessitating the appointment of a special prosecutor.

¶ 11 The Post-Conviction Hearing Act provides for a three-stage review process for the adjudication of postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v.*

Hodges, 234 Ill. 2d 1 (2009). In this case, defendant's petition was dismissed at the second stage of the postconviction process, and he argues that it should have advanced to the third stage. A defendant is entitled to a third-stage evidentiary hearing only if the allegations set forth in the petition, as supported by the record or accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403 (2003). In making this determination, all well-pleaded facts in the petition and affidavits are to be taken as true. *Id.* We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 12 The State initially contends that defendant forfeited this claim because it was not raised on direct appeal, and defendant does not allege ineffective assistance of appellate counsel regarding this issue. See *People v. Petrenko*, 237 Ill. 2d 490 (2010). However, as defendant correctly notes, the forfeiture rule is relaxed where the factual basis for a postconviction claim lies outside the record, such that it could not have been considered by the reviewing court. *People v. Whitehead*, 169 Ill. 2d 355 (1996), *overruled in part on other grounds*, *People v. Coleman*, 183 Ill. 2d 366 (1998). Here, despite the victim's maiden name appearing in the record, the record contains no evidence of the victim's alleged familial relationship with the State's Attorney. As such, defendant's claim was dependent upon information outside the record; therefore, we find the forfeiture rule does not bar consideration of his claim.

¶ 13 Turning to the merits of defendant's postconviction claim, he asserted that a special prosecutor should have been appointed where the State's Attorney was a first cousin of the victim in his case. The statutory authority for the appointment of a special prosecutor provides that "[w]henever the State's [A]ttorney is *** interested in any cause or proceeding, civil or criminal,

which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding[.]" 55 ILCS 5/3-9008 (West 2006).

¶ 14 In general, there are three situations in which a special prosecutor may be appointed: (1) the prosecutor is interested as a private individual in the case; (2) the prosecutor is an actual party to the litigation; and (3) the prosecutor's continued participation in the case creates the appearance of impropriety. *People v. Bickerstaff*, 403 Ill. App. 3d 347 (2010). The appointment of a special prosecutor is appropriate only where defendant pleads and proves specific facts regarding the nature of the conflict as well as facts tending to show that the State's Attorney would not zealously represent the People because of the conflict. See *Baxter v. Peterlin*, 156 Ill. App. 3d 564 (1987).

¶ 15 Here, defendant argues that he made a substantial showing of a constitutional violation by alleging that the State's Attorney was a first cousin of the victim, because the relationship created a conflict of interest. We note that defendant appears to argue both that the familial relationship: (1) showed the State's Attorney had a personal interest in defendant's case; and (2) created the appearance of impropriety. Taking as true defendant's allegations that the State's Attorney was a first cousin of the victim, we find that under either argument defendant has failed to alleged a disqualifying interest that would require the appointment of a special prosecutor.

¶ 16 When the alleged interest is personal, defendant must show: (1) the relationship involved significant emotional ties; or (2) that he suffered actual and substantial prejudice. *People v. Arrington*, 297 Ill. App. 3d 1 (1998). Defendant argues that the State's Attorney's alleged familial connection with the victim is sufficient to establish significant emotional ties. However,

the fact that the relationship was familial does not in and of itself create substantial emotional ties. See *People v. Polonowski*, 258 Ill. App. 3d 497 (1994) (finding lack of prejudice to defendant where State's Attorney was engaged to and subsequently married the niece of the wife of defendant's expert).

¶ 17 Moreover, defendant has not alleged any actual and substantial prejudice from the alleged conflict. See *Arrington*, 297 Ill. App. 3d 1 (finding the appointment of a special prosecutor unwarranted where defendant only alleged that the State's Attorney and victim shared the same last name). Instead, defendant cites *People v. Lang*, 346 Ill. App. 3d 677 (2004), for the proposition a special prosecutor may be appointed even in the absence of prejudice. However, in *Lang*, the court found that defendant did not need to allege prejudice because the State's Attorney's involvement in defendant's case created the appearance of impropriety. *Id.* As such, we find the court's analysis in *Lang* inapplicable to a conflict based on personal interest. Therefore, we find defendant's allegation does not support the claim that the State's Attorney was personally interested in the outcome of defendant's trial.

¶ 18 Furthermore, even when we evaluate whether the State's Attorney's alleged conflict created the appearance of impropriety, we find defendant's allegations insufficient to justify the appointment of a special prosecutor. Defendant makes the conclusory argument that the alleged familial relationship between the State's Attorney and the victim created a question of partiality. We do not agree, because the mere fact that the State's Attorney was a cousin of the victim does not create a presumption of partiality. See, e.g., *People v. Lanigan*, 353 Ill. App. 3d 422 (2004) (finding a *per se* conflict where the State's Attorney was required to both prosecute and defend defendants); *People v. Courtney*, 288 Ill. App. 3d 1025 (1997) (finding a *per se* conflict arises

when defendant's former counsel is appointed as State's Attorney). Disqualification of a State's Attorney takes more than mere suspicion or speculation. *McCall v. Devine*, 334 Ill. App. 3d 192 (2002). As such, without more, we find the alleged familial relationship insufficient to establish the appearance of impropriety, which would require a special prosecutor. Therefore, we find that defendant is not entitled to an evidentiary hearing, because he failed to make a substantial showing of a constitutional violation. See *People v. Turner*, 187 Ill. 2d 406 (1999) (stating that the mere allegation of a constitutional violation is insufficient to justify an evidentiary hearing).

¶ 19 Additionally, defendant makes a brief argument that the impartiality of the trial judge who ruled on defendant's postconviction petition should be questioned because he testified as a character witness at the State's Attorney's disciplinary hearing in April 2012. Defendant suggests that the judge's rescheduling of a jury trial and driving to Springfield to testify suggests an appearance of impropriety requiring substitution. We disagree.

¶ 20 Canon 2 of the Code of Judicial Conduct states that "[a] judge should not testify voluntarily as a character witness." Ill. S. Ct. R. 62(B) (eff. Oct. 15, 1993). Additionally, the commentary to the canon suggest that a judge does not have a privilege against testifying in response to an official summons. Ill. S. Ct. R. 62(B), Committee Comments (adopted Oct 15, 1993). In light of the judge's expectation to attend a disciplinary hearing pursuant to a summons, we find defendant's conclusory statements regarding the judge's professional relationship with the State's Attorney insufficient to show an appearance of impropriety requiring disqualification. See Ill. S. Ct. R. 63(C)(1) (eff. Apr. 16, 2007); *People v. Steidl*, 177 Ill. 2d 239 (1997) (finding that the mere fact that a judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge's removal from the

case).

¶ 21 Consequently, we hold the trial court properly denied defendant's amended postconviction petition.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 24 Affirmed.