2015 IL App (3d) 130456-U

Order filed April 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0456 Circuit No. 08-CF-1312
EARLY ATTERBERRY,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's argument in section V of his postconviction petition was not an argument for judicial bias, but an argument that the court's evidentiary ruling was error. (2) Defendant was barred *res judicata* from raising that argument in postconviction proceedings where it had previously been addressed on direct appeal.

¶ 2 Defendant, Early Atterberry, was found guilty of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)). On direct appeal, this court found that the trial court erred in admitting certain evidence, but

concluded that the error was harmless. Defendant subsequently filed a *pro se* petition for postconviction relief, which was summarily dismissed. On appeal, defendant argues for the first time that the trial court was biased against him. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)). The indictment arose from conduct occurring on various dates in 2007.

¶ 5 Prior to trial, the State filed a motion *in limine* to admit evidence of other crimes. In its motion, the State alleged that in 2005 defendant was seen in bed, wearing only his underwear, with the same victim named in the indictment. Over defense counsel's objection, the trial court allowed the presentation of that evidence as propensity evidence. Following trial, a jury found defendant guilty of the charged offenses.

¶ 6 On direct appeal from his conviction, defendant challenged the trial court's admission of the propensity evidence. *People v. Atterberry*, 2011 IL App (3d) 090505-U. This court held that the trial court erred in admitting the evidence of the 2005 incident, because it did not constitute a criminal offense or a previous bad act. *Id*. ¶ 21. However, we concluded that the error was harmless. *Id*.

¶ 7 On March 20, 2013, defendant filed a *pro se* petition for postconviction relief. Section V of the petition, regarding the trial court's admission of the propensity evidence, is the only portion of the petition relevant to this appeal. In that section, defendant claimed that his constitutional rights were "[v]iolated by [j]udicial [m]isconduct" where the trial court admitted evidence of the 2005 incident. Defendant further alleged:

> "The Circuit court Judge (Daniel J. Rozak) in 2004, ruled that allowing the other two girls to testify at Weber's trial would prejudice the jury. Rozak was skeptical that Weber's actions with them, if true, would constituted 'prior bad acts'—EVIDENCE THAT he had a patten [*sic*] of using his authority to initiate sexual contact with young women."

Defendant concluded that "the trial judge Daniel J. Rozak, created his own Judicial misconduct when he first allowed the State's Attorney to admit in trial evidence that he knew or should have known did not EXIST."

¶ 8 The trial court dismissed defendant's petition at the first stage of postconviction proceedings, finding it frivolous and patently without merit. In its order dismissing the petition, the court addressed each section of the petition individually. In regard to section V, the court wrote "this court has absolutely no idea how this court's ruling in an apparently unrelated case (i.e. '…at Weber's trial…') several years earlier should impact this case[.]"

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that his postconviction petition set forth the gist of a constitutional claim, and therefore was improperly dismissed as frivolous and patently without merit. Specifically, he contends that section V of the petition presented the gist of a claim of a denial of the right to due process based upon judicial bias. We find that section V of defendant's petition cannot be construed as making an argument of judicial bias, and is instead simply an argument that the court's evidentiary ruling was in error. That argument, having already been brought on direct appeal, is barred *res judicata*. Further, even if defendant's postconviction petition could be construed as raising a claim of judicial bias, defendant has forfeited such a claim by his failure to bring it on direct appeal.

¶ 11 The Post–Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2012)) provides a statutory remedy to criminal defendants claiming substantial violations of their constitutional rights at trial. *People v. Edwards,* 2012 IL 111711. Our supreme court in *People v. Barrow*, 195 Ill. 2d 506 (2001), discussed the scope of postconviction proceedings and the application of *res judicata* and forfeiture to those proceedings:

> "The Post–Conviction Hearing Act [citation] provides a remedy by which defendants may challenge their convictions or sentences for violations of federal or state constitutional law. [Citations.] A post-conviction action is a collateral proceeding, and not an appeal from the underlying judgment. [Citations.] The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal. [Citations.] Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived."[1] *Id*. at 518-19.

[1] Although the *Barrow* court discussed waiver, we note—as has the supreme court itself—that there is a distinct difference between waiver and forfeiture. See *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 320 n.2 (2008) ("While waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements. [Citations.] These characterizations apply equally to criminal and civil matters."). Thus the relinquishment of an argument through failure to bring it on direct appeal—or failure to include in a postconviction petition—is properly termed a forfeiture of that argument.

¶ 12 We find that even construed liberally, an argument of judicial bias is not contained in defendant's postconviction petition.[2] In section V of his postconviction petition, defendant never alleges that the trial judge was prejudiced or biased against him. Although the phrase "judicial misconduct" is used throughout that section of the petition, the apparent argument is that the trial court committed judicial misconduct by ruling incorrectly on the evidentiary issue. Further, as the trial court pointed out in its order, the petition does not indicate how the ruling at "Weber's trial" referenced in the petition is related to the case at bar. Although defendant argues on appeal that this reference relates to a claim of judicial bias, that interpretation is plainly not supported by the petition itself.[3]

¶ 13 At best, section V of defendant's postconviction petition may be interpreted as an argument that the court erroneously admitted evidence of the 2005 incident. Of course, this issue was squarely addressed by this court on direct appeal. *Atterberry*, 2011 IL App (3d) 090505-U. Consequently, the argument is barred *res judicata*.

¶ 14 Even assuming, *arguendo*, that defendant's postconviction petition could be construed as raising a claim of judicial bias, this claim would have been forfeited by defendant's failure to raise it on direct appeal. Accordingly, we affirm the trial court's first-stage dismissal of defendant's postconviction petition. See *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74

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[2] In determining whether an argument is found in the postconviction petition, a reviewing court should interpret the petition liberally. See *People v. Pendelton*, 356 Ill. App. 3d 863, 869 (2005), *rev'd on other grounds*, 223 Ill. 2d 458 (2006).

[3] Although we ultimately do not reach the merits of defendant's argument on appeal, we note that mere reference to allegedly erroneous rulings by a judge is insufficient to make out a claim for judicial bias. See *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002).

(reviewing court may affirm on any grounds supported by the record).

¶ 15 CONCLUSION

¶ 16 The judgment of the circuit court of Will County is affirmed.

¶ 17 Affirmed.