2015 IL App (4th) 131081-U

NO. 4-13-1081

FILED
July 17, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
SHANE LONG,	)	No. 10CF563
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial judge was not obligated to have another judge review defendant's motion for substitution of judge during postconviction proceedings.

(2) The trial court did not err in dismissing defendant's postconviction petition at the second stage of the proceedings when defendant failed to demonstrate a substantial deprivation of his constitutional rights.

¶ 2 Defendant, Shane Long, appeals from the trial court's second-stage dismissal of his postconviction petition. Defendant alleged the judge presiding over his postconviction proceedings, the same judge who presided over his bench trial, was prejudiced against him since he was friends with the victim's father. Defendant failed to demonstrate such impropriety, prejudice, or bias, and therefore, we affirm the court's dismissal.

¶ 3 I. BACKGROUND

¶ 4 In an August 2010 bench trial, the Honorable Judge Reynard presiding, defendant was convicted of unlawful restraint, aggravated battery, and domestic violence after a May 2010

confrontation with his girlfriend, Jacqueline Katz. After the couple had left a tavern together, defendant became angry at Katz and punched her in the mouth as she drove. At a stop sign, she tried to escape. Defendant caught her, dragged her back to the car, and put her in the passenger seat. When they arrived at their apartment, defendant beat Katz and locked her in the bedroom, threatening to kill her if she came out. She escaped through the window. Defendant found her outside, took her back inside the apartment, and beat her again. When defendant fell asleep, Katz escaped to her friend's house, where she called the police.

¶ 5 In its written order, the trial court found (1) Katz's testimony more credible than defendant's (he claimed self-defense), and (2) the testimony of Katz's friend "not only imploded, it powerfully discredited the entirety of the defendant's position." The court found defendant guilty of each charged offense. The court denied defendant's motion for a new trial, wherein defendant claimed the court had failed to fully consider his affirmative defense. The court sentenced defendant to concurrent terms of seven years on his aggravated-battery conviction, five years on his unlawful-restraint conviction, and two terms of 364 days on each domestic-battery conviction. The first two sentences were extended terms. Defendant appealed, again posing the lack of consideration of his self-defense claim, and also arguing his sentence on his unlawful-restraint conviction should not have been subject to an extended term. This court affirmed defendant's conviction, but reduced his unlawful-restraint sentence to three years, the maximum non-extended term. See *People v. Long*, 2012 IL App (4th) 110537-U, ¶ 27.

¶ 6 In April 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), claiming (1) his trial counsel had failed to call certain witnesses at trial, and, (2) because Judge Reynard was personal friends with Katz's father, a different judge should be assigned to consider defendant's

petition. The trial court appointed counsel for defendant and the State filed a motion to dismiss, claiming a section 2-1401 petition was the wrong vehicle for the alleged claims.

¶ 7 In December 2012, defendant filed a "motion for ineffective counsel," arguing his appointed counsel had failed to amend his section 2-1401 petition. The trial court allowed defendant to proceed *pro se*. Defendant subsequently filed a motion for substitution of judge, claiming (1) the judge hearing his petition should be one who was not involved in his original proceedings, and (2) he can demonstrate prejudice. Judge Reynard denied defendant's motion as frivolous and patently without merit.

¶ 8 In May 2013, the trial court granted defendant's motion to transform his section 2-1401 petition into a postconviction petition. In the newly filed petition, defendant asserted (1) his trial counsel had failed to call certain witnesses at trial, (2) the State committed a discovery violation, (3) Judge Reynard and Katz's father were friends, (4) a new judge should be assigned to consider his petition, and (5) he received ineffective assistance of appellate counsel for failure to raise these issues on appeal. Attached to the petition was defendant's affidavit, in which he stated he became aware of the relationship between Judge Reynard and Katz's father on November 8, 2010 (after the trial but before sentencing). Also attached to defendant's petition was a notarized letter signed by Katz, indicating that, before defendant's bench trial, Katz's father sent her a text message which stated "he would need to take 'Charley' to lunch," presumably referring to Judge Reynard. Katz indicated her father and Judge Reynard knew each other from her father's former employment as a Bloomington police detective. Next to Katz's signature was that of a notary and the notary's stamp. However, there is no indication on the letter whether the notary, in witnessing or attesting Katz's signature, determined, either from personal knowledge

or from satisfactory evidence, that the signature was that of Katz. See 5 ILCS 312/6-102(c) (West 2012).

¶ 9 In August 2013, the State filed a motion to dismiss defendant's postconviction petition, alleging, *inter alia*, defendant had waived any claim of error related to the relationship between Katz's father and Judge Reynard since their respective former positions were matters of record during the trial and defendant had not previously objected.

¶ 10 The trial court conducted a hearing on the State's motion to dismiss. After considering the arguments from the State and defendant *pro se*, Judge Reynard stated as follows:

> "The evidence presented with respect to the relationship of the Judge and detective—former Detective Katz is not of the character that it has established even a threshold of concern about the court's fairness.
>
> A number of other procedural waivers are also found to be well taken. There is no basis for the court to conclude that there has occurred a violation of the defendant's constitutional rights. Accordingly, the motion to dismiss is allowed."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Dismissal of Motion for Substitution of Judge

¶ 14 Citing section 114-5(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(d) (West 2010)), defendant first contends Judge Reynard should have appointed another judge to consider defendant's recusal motion, rather than ruling on the motion himself. Indeed, section 114-5(d) provides that a judge not named in the motion should consider the

motion. However, Illinois courts have held that section 114-5(d) does not apply to postconviction proceedings. See *People v. Wilson*, 37 Ill. 2d 617, 620 (1967) (postconviction proceedings are civil in character yet neither criminal nor civil statute regarding substitution of judge applies); *People v. Burton*, 108 Ill. App. 3d 771, 772 (1982) (section 114-5 of the Code does not apply to postconviction proceedings); *People v. Thompkins*, 181 Ill. 2d 1, 22 (1998) ("Illinois statutory provisions relating to substitutions of judges and changes of venue do not apply in post-conviction proceedings"); *People v. Meeks*, 249 Ill. App. 3d 152, 161 (1993) (section 114-5 of the Code does not apply in postconviction proceedings); *Gibson v. People*, 377 Ill. App. 3d 748, 751 (2007) ("the Illinois statutory provisions relating to substitutions of judges do not apply in postconviction proceedings").

¶ 15 Because the statute does not provide defendant with an absolute right to a substitution of judge in a postconviction proceeding, the judge who presided over the criminal trial should hear the postconviction petition unless the judge is substantially prejudiced. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). To establish "substantial prejudice," a defendant must demonstrate the judge holds "animosity, hostility, ill will, or distrust," or "prejudice, predilections or arbitrariness." *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006). "[O]nly under the most extreme cases is disqualification on the basis of bias or prejudice constitutionally required." *Thompkins*, 181 Ill. 2d at 22.

¶ 16 If there is an appearance of prejudice, a judge must recuse himself from postconviction proceedings. *Thompkins*, 181 Ill. 2d at 22. The judge himself is in the best position to determine whether he can be impartial. *Harvey*, 379 Ill. App. 3d at 522. "It is presumed that judges will be impartial, but they must ultimately determine whether they can 'hold the balance nice, clear[,] and true between the State and the accused.' " *Harvey*, 379 Ill.

App. 3d at 522 (quoting *People v. Jackson*, 205 Ill. 2d 247, 277 (2001)). Disqualifying a judge for cause is not a judgment to be lightly made. *People v. Patterson*, 192 Ill. 2d 93, 134 (2000).

¶ 17 In April 2012, defendant first alleged, in his *pro se* petition for relief from judgment, that Judge Reynard and Katz's father were personal friends, and therefore, defendant requested that a new judge be assigned to consider his petition. In March 2013, in his amended *pro se* petition for relief from judgment, defendant also raised the issue. He also filed an accompanying motion for substitution of judge with an attached affidavit. However, the affidavit merely referenced the "facts stated in [the] attached motion [for] substitution of judge." Judge Reynard denied the motion for substitution of judge as frivolous and patently without merit. In May 2013, defendant filed a motion to transform his section 2-1401 petition into a postconviction petition, but asking that another judge consider his petition. Attached thereto was (1) defendant's affidavit, stating he became aware of the personal relationship between Judge Reynard and Katz's father on November 8, 2010, and (2) a notarized letter from Katz, stating her father indicated he would need to take "Charley" to lunch (presumably referring to Judge Reynard).

¶ 18 First, as stated above, section 114-5 of the Code does not apply to defendant's postconviction proceedings, and therefore Judge Reynard was not obligated to transfer the case to another judge for consideration of defendant's motion for substitution of judge. See *Harvey*, 379 Ill. App. 3d at 523 (section 114-5 did not apply so the judge "was not required to transfer the substitution motion to another judge for evaluation, nor was he divested of his authority in the case in the meantime").

¶ 19 Second, because there was insufficient evidence to demonstrate Judge Reynard held "animosity, hostility, ill will, or distrust" or "prejudice, predilections or arbitrariness"

toward defendant, we find no justification to disqualify Judge Reynard from this case. The letter from Katz did not provide sufficient sworn information to warrant Judge Reynard's recusal. Further, Judge Reynard considered defendant's allegation of bias or prejudice frivolous and patently without merit. Since he was in the best position to make the determination as to whether he could remain impartial, we will not disturb that finding. See *Harvey*, 379 Ill. App. 3d at 522. Nothing on this record before us suggests Judge Reynard exhibited a personal bias or prejudice toward defendant that would justify a recusal pursuant to the Code of Judicial Conduct. See Ill. S. Ct. R. 63(C)(1)(a) (eff. Apr. 16, 2007) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]"). The implication that Judge Reynard and Katz's father were friends, without more, was insufficient to justify the judge's disqualification from these postconviction proceedings. With these findings, we conclude Judge Reynard presided over defendant's postconviction proceedings with full authority.

¶ 20 B. Dismissal of Postconviction Petition

¶ 21 Defendant also contends the trial court erred in dismissing his postconviction petition at the second stage without the opportunity to fully develop his allegations that Judge Reynard was not impartial during his bench trial due to his personal relationship with Katz's father. Defendant claims he sufficiently alleged a substantial deprivation of his constitutional rights sufficient to proceed to a third-stage evidentiary hearing.

¶ 22 At the second stage of the postconviction hearing proceedings, the trial court, while taking all well-pleaded facts as true, must determine whether the allegations sufficiently

demonstrate a constitutional violation which would entitle defendant to relief. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). To be entitled to an evidentiary hearing, a defendant must make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381. "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits. [Citation.] Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Coleman*, 183 Ill. 2d at 381. We review a second-stage dismissal *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23 A postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). " '[A]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths.' " *People v. Hemingway*, 2014 IL App (4th) 121039, ¶ 19 (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002)). Without such characteristics, a document is not an affidavit and is considered a nullity. *Hemingway*, 2014 IL App (4th) 121039, ¶ 20. That is, the lack of a proper supporting affidavit is fatal to a postconviction petition. *Hemingway*, 2014 IL App (4th) 121039, ¶¶ 24-25 (a witness's statement that has a notary seal stamped on it (giving the name of the notary public and the date her commission expires), but does not have a notary clause or a clause signed by the notary public affirming that the witness swore to the statement in her presence, lacks notarization and is grounds for dismissal).

¶ 24 Katz's notarized letter was not the equivalent of an affidavit. Although the letter was signed by Katz and a notary, with the notary's stamp included, it was not Katz's sworn statement and was not authorized as such by the notary whose stamp appears on the letter. There

was no indication the notary confirmed Katz's identity as the person signing the letter and no indication that Katz swore to the statement in the notary's presence.

¶ 25 In the letter, Katz stated as follows:

> "My name is Jacqueline Katz. I'm writing this letter because I feel it is the honest and right thing to do. My father is Daniel Katz, a former Bloomington detective. When my father found out who [defendant] and I's judge was for the case between [defendant] and I, he stated via text message to me that he would need to take 'Charley' to lunch. This text conversation between my father and I took place before [defendant] and I went to the bench trial. I do not know if my father actually took Judge Reynard to lunch, but I know they know each other."

¶ 26 Not only is this document *not* an affidavit, but the information contained in the letter does not suggest judicial bias or prejudice against defendant. Even if we accept the hearsay offerings, Katz says her father told her he would have to take "Charley" to lunch. Defendant has not provided any further information to suggest Katz's father and Judge Reynard ever went to lunch, ever spoke about the case, or that Katz's father provided the judge with any information regarding defendant. Defendant provides no corroborating evidence that Katz's father and Judge Reynard even know each other. An affidavit from Katz's father may have been helpful to explain the nature of the relationship, if any, between he and the judge. Without any corroborating or verifying information, Katz's unsworn statement is not sufficient to demonstrate defendant suffered a substantial constitutional violation.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.