2015 IL App (2d) 150073-U
No. 2-15-0073
Order filed January 6, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE VELAZQUEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-2145 Honorable James C. Hallock, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial judge erred in hearing defendant's motion for reconsideration of his sentence after he had been disqualified as of right, and defendant did not affirmatively invite the error; thus, we vacated the ruling and remanded for rehearing before a different judge.

¶ 2 Defendant, Jose Velazquez, appeals after the court, in the person of Judge James C. Hallock, denied his amended motion for reconsideration of his sentence. On appeal, defendant raises for the first time the claim that the denial was error because defendant had previously caused Judge Hallock to be disqualified under section 114-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(a) (West 2010)) (replacement as of right). The

State concedes that Judge Hallock's deciding the motion was error, but argues that, because it was invited error, defendant is estopped to raise it. We agree that it was error for Judge Hallock to decide the motion, and we further hold that, because defendant did not positively accept or encourage Judge Hallock's hearing of the motion, the error was not invited. We therefore vacate the motion's denial and remand the cause for the motion to be heard before a judge not disqualified.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of burglary (720 ILCS 5/19-1(a) (West 2010)) and one count of criminal damage to property (720 ILCS 5/21-1(a)(1) (West 2010)). The case was assigned to Judge Hallock. Defendant moved for a substitution of judge under section 114-5(a) of the Code. The motion was granted and the case transferred.

¶ 5 On February 16, 2012, defendant pled guilty to the burglary count, with the State agreeing only to nol-pros the criminal-damage-to-property count. On November 20, 2012, the court sentenced defendant to 10 years' imprisonment and ordered him to pay $1,398.77 in restitution. Defendant moved for reconsideration of the sentence on November 27, 2012. On December 12, 2012, defendant filed a second motion for substitution of judge. Defendant withdrew that motion on December 19, 2012, with counsel acknowledging at the hearing that this was defendant's second motion for substitution.

¶ 6 On February 7, 2013, the court denied defendant's motion for reconsideration of the sentence, and defendant filed a notice of appeal.

¶ 7 We summarily vacated the order denying the motion to reconsider and remanded the cause to allow defendant to file a new motion for reconsideration of his sentence. *People v. Velazquez*, No. 2-13-0146 (March 11, 2014) (minute order). On July 30, 2014, the case was set

for reassignment because the judge who had accepted the plea and sentenced defendant had retired. The case was assigned to Judge Hallock, and two hearings took place before him, the first of which dealt solely with administrative matters. Defense counsel, the same attorney who had represented defendant previously, filed an amended motion for reconsideration. Judge Hallock denied defendant's motion, noting at the hearing that the full court file had not yet been returned to the trial court. Defendant filed a timely notice of appeal.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues that Judge Hallock's participation in the proceeding after defendant sought and gained his removal was error and that Judge Hallock had the personal duty to avoid hearing a matter in which he was disqualified. Defendant argues in the alternative that counsel was ineffective for failing to alert Judge Hallock to his disqualification.

¶ 10 The State concedes that a disqualified judge should not decide a substantive motion. However, it argues that we should hold that defendant is barred from raising the issue on appeal, based on invited error. It argues that "despite the previous order substituting Judge Hallock as a matter of right, the defendant should be estopped [to] now rais[e] this argument," based on defense counsel's "decision not to notify Judge Hallock of the prior order disqualifying him." It suggests, because the record—in particular, the transcript of the hearing on the second substitution motion—shows defense counsel's awareness of Judge Hallock's disqualification, she must have been acting in an "attempt to manipulate the substitution process" in order to "ensure another remand" in the event of an adverse ruling by Judge Hallock. It also argues that the decision not to raise Judge Hallock's disqualification was "apparently strategic" and thus not ineffective.

¶ 11 Judge Hallock's participation was error,[1] as the State concedes. See, *e.g.*, *People v. Banks*, 213 Ill. App. 3d 205, 213 (1991) ("Once a motion for substitution of judge is brought, the trial judge loses all authority and power over the defendant's cause, except to make all necessary orders to effectuate the change."). The remaining question is whether a bar exists, as the State argues. We hold that the record does not establish estoppel in its sense of invited error.

¶ 12 No invited error occurred here. "The rule of invited error or acquiescence is a form of procedural default also described as estoppel." *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33. "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). For a party to invite error, he or she must do more than fail to object to an error; were this not so, no error could be reviewed as plain error. Thus, for error to be invited error, the party raising the error must have at least affirmatively agreed to proceed in the manner at issue. See, *e.g.*, *People v. Spencer*, 2014 IL App (1st) 130020, ¶¶ 26-27 ("For the doctrine to apply, the defendant must affirmatively request

[1] We note that, under the older precedent available, Judge Hallock's decision would not merely be error; it would result in a void decision. See, *e.g.*, *People v. Ryan*, 264 Ill. App. 3d 1, 3 (1994) (if the court improperly denies a motion for substitution, the judge lacks authority to act and any action taken by the judge is void). That concept of lack of authority is inconsistent with modern jurisdictional principles. See *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-19; *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 552-54 (2003); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 337 (2002); *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529-30 (2001). Nothing in the change in jurisdictional reasoning challenges the idea that a ruling by a disqualified judge is *error*.

or agree to proceed in a certain way."). Here, nothing in the record suggests that anyone noticed the problem at the time of the hearing on remand. Indeed, although the State points out that defense counsel must have known about Judge Hallock's disqualification, the timing of the hearing, more than a year after counsel was reminded of the disqualification when she filed a second motion for disqualification, suggests that the failure to raise the disqualification was purely inadvertent.

¶ 13 As a final matter, we point out that the hearing of a substantive motion by a disqualified judge is a serious error implicating a defendant's due-process rights. The right to substitution is Illinois's primary mechanism of protecting a defendant from trial before a biased judge, which is structural error (*People v. Averett*, 237 Ill. 2d 1, 13 (2010)). The supreme court explained the critical role of section 114-5(a) in *People v. Walker*, 119 Ill. 2d 465 (1988), in which it rejected a separation-of-powers-based challenge to the constitutionality of the section. In *Walker*, the court recognized that Illinois law had long previously "laid to rest" the "quixotic common law notion that the cold neutrality of a judge could never yield to prejudice or bias." *Walker*, 119 Ill. 2d at 479. This was done by the legislature, which in 1874, "cast free from its common law mooring the ill-conceived rule that a judge could not be disqualified for prejudice." *Walker*, 119 Ill. 2d at 479. Thus, "[s]ection 114-5(a), like its predecessors, effectuates the right to a fair trial—a right of constitutional dimension [citation]—by affording a defendant the substantive right to substitute a judge who appears to be prejudiced." *Walker*, 119 Ill. 2d at 480. In short, section 114-5(a), in conjunction with section 114-5(d) (725 ILCS 5/114-5(d) (West 2010)) (substitution for specified cause) is the prime mechanism protecting a defendant from a biased court.

¶ 14 Because we reverse on the basis that it was error for Judge Hallock to decide defendant's motion for reconsideration of his sentence, we need not address defendant's alternative claim,

that defense counsel was ineffective for allowing Judge Hallock to decide the motion.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we vacate the denial of defendant's motion for reconsideration of his sentence, and we remand the cause for hearing before a judge not disqualified.

¶ 17 Vacated and remanded with directions.