2018 IL App (3d) 160582-U

Order filed December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0582 Circuit No. 05-CF-1079
WILLIE D. ORR,	)	
Defendant-Appellant.	)	Honorable Richard A. Zimmer, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing defendant's successive postconviction petition at the second stage.

¶ 2 Defendant, Willie D. Orr, appeals the second-stage dismissal of his successive postconviction petition. Defendant contends that his petition made a substantial showing of a constitutional violation based on his allegation that the trial judge should have recused himself from defendant's jury trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(3) (West 2004)) for shooting Juan Darte. Judge Walter D. Braud presided over the trial and sentencing. The presentence investigation report showed that defendant—25 years old at the time of the offense—had prior convictions for residential burglary, two charges of possession of a stolen motor vehicle, and possession of a controlled substance. At the sentencing hearing, Judge Braud found that defendant showed no remorse. Judge Braud also found defendant to be a high-risk offender with little likelihood of rehabilitation. Judge Braud sentenced defendant to the maximum available extended-term sentence of 100 years' imprisonment.

¶ 5 On appeal, this court affirmed defendant's conviction and sentence. *People v. Orr*, No. 3-08-0224 (2010) (unpublished order under Supreme Court Rule 23). Defendant then filed a postconviction petition. The circuit court dismissed the petition at the first stage, and this court affirmed. *People v. Orr*, No. 3-12-0159 (2013) (unpublished dispositional order).

¶ 6 Subsequently, defendant filed a motion for leave to file a successive postconviction petition. Defendant's petition alleged that his mother told him that his aunt, Luevonda Orr, and Judge Braud's brother, Charles Braud had a contentious 10-year relationship. Defendant did not know about the relationship until after he filed his first postconviction petition. According to defendant, Judge Braud should have recused himself from presiding over defendant's jury trial. Defendant attached an affidavit from his mother to the petition. His mother's affidavit stated that Charles had been in an ongoing relationship with Luevonda for the past 10 years. Defendant's mother stated that Judge Braud "disowned" Charles for a period of time when Charles began the relationship with Luevonda. According to defendant's mother, Charles and Luevonda had an altercation which resulted in Judge Braud jailing Luevonda but not jailing Charles. Defendant's mother believed that Judge Braud "hate[d] the Orrs" and that Judge Braud "never liked us."

¶ 7 Next, defendant amended his successive postconviction petition adding an allegation that Judge Braud had been involved in a domestic dispute between Charles and Luevonda. Defendant included a 2012 request for order of protection filed by Charles against Luevonda (filed seven years after defendant's sentencing). Defendant also included his own affidavit stating that Luevonda told him that she had many altercations with Judge Braud, Judge Braud hated her, and she hated Judge Braud.

¶ 8 After several reassignments, Judge Braud presided over defendant's petition. Defendant moved for a substitution of judge, but Judge Braud initially denied the motion deciding to preside over the cause "until I see something that says I really can't do it." Judge Braud then ordered the State to respond to defendant's petition. However, Judge Braud later allowed the substitution of judge and the case was reassigned. The new judge found that Judge Braud had intended for defendant's petition to advance to the second stage. The new judge therefore granted defendant leave to file his successive postconviction petition and ordered the State to respond.

¶ 9 Defendant received appointed counsel to represent him during the second stage. Counsel filed an amended successive postconviction petition which argued that Judge Braud should have recused himself from defendant's jury trial in accordance with Illinois Supreme Court Rule 63(C)(1)(a) (eff. Apr. 1, 2003) due to the relationship between Charles and Luevonda. Counsel attached defendant's prior pleadings, including his mother's affidavit and letter, to the amended successive postconviction petition.

¶ 10 The State filed a motion to dismiss defendant's successive postconviction petition. Upon hearing arguments, the circuit court granted the State's motion to dismiss.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant contends that his successive postconviction petition made a substantial showing of bias on the part of his trial and sentencing judge. He argues that this court should remand the matter for a third-stage evidentiary hearing on this claim. Taking the allegations in defendant's petition as true, we find defendant failed to make a substantial showing of a constitutional violation in that he did not establish actual prejudice or an appearance of impropriety on the part of Judge Braud. Therefore, we hold that the circuit court did not err in dismissing defendant's successive postconviction petition.

¶ 13 In this case, defendant argued in his successive postconviction petition that Judge Braud should have recused himself from defendant's jury trial because Judge Braud's brother, Charles, had been involved in a 10-year contentious relationship with defendant's aunt, Luevonda. Defendant supported this argument with a letter and an affidavit from his mother stating that Judge Braud knew about the relationship and "disowned" Charles due to the relationship. Her letter also stated that Judge Braud became judicially involved in the quarrelsome relationship in that Judge Braud jailed Luevonda but did not jail Charles. Defendant therefore argued that Judge Braud should have disqualified himself from presiding over defendant's jury trial because his impartiality might reasonably be questioned based on a personal bias against defendant and his family, and Judge Braud failed to bring the matter to the parties attention.

¶ 14 "Whether a judge should recuse himself is a decision in Illinois that rests exclusively within the determination of the individual judge, pursuant to the canons of judicial ethics found in the Judicial Code." (Emphasis omitted.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45. Illinois Supreme Court Rule 63(C)(1)(a) (eff. Apr. 1, 2003) requires a judge to recuse himself in a proceeding in which the judge's impartiality might reasonably be questioned. This includes instances in which the judge has a personal bias or prejudice concerning a party. *Id*. A judge is

not required to recuse himself based on the mere appearance of impropriety. *People v. Buck*, 361 Ill. App. 3d 923, 932 (2005). Rather, an inquiry must be made as to whether a reasonable person, aware of the facts and the law, would believe that the judge was impartial. *Id.* A trial judge is presumed to be impartial, and the burden of overcoming the presumption rests on the party making the charge of prejudice. *People v. Jackson*, 205 Ill. 2d 247, 276 (2001). "[O]nly under the most extreme cases would disqualification on the basis of bias or prejudice be constitutionally required." *People v. Del Vecchio*, 129 Ill. 2d 265, 275 (1989).

¶ 15 In this case, nothing alleged by defendant established Judge Braud's actual prejudice or bias against defendant. Nor do defendant's allegations raise the mere appearance of impropriety. Defendant made no allegation that Judge Braud knew or should have known defendant's familial relation to Luevonda at the time of defendant's trial. There is no evidence or allegation that Luevonda appeared at any stage of defendant's trial or that the court should have been alerted to the existence of the relationship. Under the facts alleged in defendant's petition, it is reasonable to believe that Judge Braud did not have any awareness of defendant's relation to Luevonda at the time of trial.

¶ 16 Even assuming Judge Braud should have known of defendant's familial relation to Luevonda, defendant failed to allege any facts that the purported "bad blood" between Judge Braud, Charles, and Luevonda existed at the time of defendant's trial or sentencing. The only specific allegation concerning the animosity between Charles and Luevonda is an order of protection filed in 2012—well after defendant's trial and sentencing. Defendant's remaining allegations of bias (Judge Braud hated defendant's family, Judge Braud became judicially involved in Charles and Luevonda's quarrels, and Judge Braud "disowned" Charles for his relationship with Luevonda) are conclusory. Moreover, these vague allegations fail to explain

how Charles and Luevonda's relationship would in any way raise a doubt as to Judge Braud's impartiality at defendant's trial. In sum, defendant's allegations to support his assertion that Judge Braud should have *sua sponte* recused himself are not extreme or factually defined enough to constitutionally require the disqualification of the trial judge for bias or prejudice. Therefore, we find defendant failed to make a substantial showing of a constitutional violation and he is not entitled to a third-stage evidentiary hearing.

¶ 17 In reaching this conclusion, we reject defendant's contention that "given Judge Braud's bias toward defendant's family, the sentence imposed is reasonably subject to question." Defendant speculates that the maximum sentence he received might be based on Judge Braud's personal prejudice toward defendant and his family. The sentence imposed in this case is within the discretion of the circuit court. 730 ILCS 5/5-5-3.2(b)(7), 5-8-2(a)(1) (West 2004). The evidence presented at trial and at the sentencing hearing all support the imposition of the maximum sentence available. We find nothing in the court's comments at sentencing that were improper or suggest that the court determined defendant's sentence on factors outside its discretion.

¶ 18 We also reject defendant's argument that it is "troubling" that Judge Braud initially refused to disqualify himself from presiding over defendant's successive postconviction petition. This argument ignores the fact that Judge Braud ultimately did recuse himself and the cause was heard by a different judge. The delay in Judge Braud's disqualification in no way creates an appearance of impropriety.

¶ 19 While not necessary to our disposition, we note that the substituted judge believed that Judge Braud intended to allow defendant leave to file his successive petition. However, as the new judge, the court should have independently analyzed defendant's motion to determine

whether defendant should be allowed leave to file his successive postconviction petition. We acknowledge that the court likely granted defendant leave to file his successive postconviction petition in the interest of transparency due to the allegation of judicial bias. Nevertheless, we believe that defendant should not have been granted leave to file his successive petition as defendant failed to show the requisite prejudice. To establish prejudice, defendant must show that the claimed constitutional error so infected his trial that the resulting conviction violated due process. *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). In his motion, defendant failed to identify any statement or ruling made by Judge Braud during the trial that would suggest that Judge Braud knew of the familial relationship. Defendant also failed to provide any specific explanation as to how the familial relationship would in any way influence Judge Braud's decisions. In other words, defendant's allegations of bias fall well short of establishing any prejudice. Therefore, the circuit court should have denied defendant leave to file his successive postconviction petition.

¶ 20 III. CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 22 Affirmed.