2013 IL App (4th) 120111-U

NO. 4-12-0111

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 6, 2013
Carla Bender
4th District Appellate
Court, IL

DONALD COOKSON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
RANDY DAVIS,	)	No. 11MR708
Defendant-Appellee.	)	
	)	Honorable
	)	John Schmidt,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiff failed to establish circuit court judge should have recused himself from considering plaintiff's *pro se* complaint for *habeas corpus* relief based on an allegation the judge served as the Sangamon County State's Attorney when plaintiff was prosecuted for the underlying offense.

(2) Plaintiff's complaint for *habeas corpus* relief was properly summarily dismissed as frivolous.

¶ 2 Plaintiff, Donald Cookson, appeals the trial court's dismissal of his *pro se habeas corpus* complaint against defendant, Randy Davis. Thirty days after the complaint's filing, the trial court found the matter frivolous and dismissed Cookson's case *sua sponte*. Cookson appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2001, following a jury trial, Cookson was sentenced to 25 years'

imprisonment for predatory criminal sexual assault (720 ILCS 5/12-14.1 (West 1998)). On December 7, 2011, Cookson filed a *pro se habeas corpus* complaint. In his complaint, Cookson alleged three grounds for relief. First, Cookson alleged his right to due process was violated at trial when the State failed to divulge evidence of other sexual-assault cases involving the victim's parents. Second, Cookson alleged he was denied the effective assistance of counsel because his trial counsel failed to obtain that evidence. Third, Cookson alleged he was denied the effective assistance of counsel when the trial court granted a motion *in limine* that precluded testimony showing the victim made prior sexual-abuse allegations against her biological father.

¶ 5 On January 6, 2012, the trial court dismissed Cookson's complaint. The court stated it had reviewed Cookson's petition and found it to be frivolous. This appeal followed.

¶ 6 II. ANALYSIS

¶ 7 On appeal, Cookson does not argue his claims are not frivolous or that they are proper *habeas corpus* claims. Cookson, instead, argues Judge John P. Schmidt, the judge who ruled on his *habeas* petition, had an impermissible conflict of interest as he was the State's Attorney at the time of Cookson's underlying conviction. Cookson maintains the statute should prevent such situations from occurring and argues Judge Schmidt should have disqualified himself as he was identified on Cookson's certificate of service as the Sangamon County State's Attorney and his partiality was apparent due to the fact Judge Schmidt, he maintains, did not read the *habeas* petition.

¶ 8 Illinois Supreme Court Rule 63(C)(1)(b) (eff. Apr. 16, 2007) mandates a judge shall disqualify himself or herself when "the judge served as a lawyer in the matter in controversy." Disqualification or recusal under this rule is unnecessary, however, "when the judge's

activities were supervisory in nature." See *In re Detention of Hargett*, 338 Ill. App. 3d 669, 674, 786 N.E.2d 557, 561 (2003).

¶ 9 We find the record does not establish Judge Schmidt had an impermissible conflict of interest. In support of his argument, Cookson relies on one piece of "evidence": his "Proof/Certificate of Service" upon which he identified Judge Schmidt as the Sangamon County State's Attorney. Nothing in the record or in Cookson's complaint, however, establishes Judge Schmidt was a lawyer in the matter in controversy for purposes of Rule 63(C)(1)(b). No evidence shows Judge Schmidt participated in Cookson's prosecution other than in a supervisory role.

¶ 10 In addition, we find no merit to Cookson's argument Judge Schmidt's alleged bias is indicated in his failure to review the *habeas corpus* complaint. Nothing in the record supports Cookson's allegations Judge Schmidt did not read the complaint.

¶ 11 Moreover, we find Cookson forfeited his recusal argument. A *habeas corpus* action is a civil action. See generally *Hennings v. Chandler*, 229 Ill. 2d 18, 24, 890 N.E.2d 920, 923 (2008). After Judge Schmidt dismissed his *habeas* petition, Cookson could have challenged the dismissal by filing a motion to reconsider. Had Cookson done so, Judge Schmidt would have had the opportunity to recuse himself, if necessary, or to state on the record the reasons a recusal would be unnecessary. Because Cookson did not file such a motion and raise the issue in the trial court, such opportunity was denied. The matter is forfeited from our review. See *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 545, 917 N.E.2d 1065, 1072 (2009) (noting arguments not made before the circuit court are forfeited on appeal).

¶ 12 We further find Cookson's allegations do not establish a viable *habeas corpus*

claim and are frivolous. "[*H*]*abeas corpus* relief is appropriate only where the trial court lacked jurisdiction or where some occurrence has taken place after the prisoner's conviction that entitles him to release." *Adcock v. Snyder*, 345 Ill. App. 3d 1095, 1098, 804 N.E.2d 141, 143 (2004) (after quoting 735 ILCS 5/10-124 (West 1998)). A circuit court may *sua sponte* dismiss a plaintiff's *habeas corpus* complaint when, upon reviewing the complaint and attached documents, the court determines the claimant cannot possibly win *habeas corpus* relief. *Hennings*, 229 Ill. 2d at 32, 890 N.E.2d at 928. Such relief includes the plaintiff's discharge from prison or admittance to bail. See 735 ILCS 5/10-106 (West 2010).

¶ 13 Cookson's complaint sets forth no claims that entitle him to *habeas corpus* relief. Cookson challenges the State's alleged failure to divulge evidence before his trial and his counsel's effectiveness at trial. *Habeas corpus* actions are not permissible substitutes for direct appeal and may not be used "to correct mere judicial error." *Baker v. Department of Corrections*, 106 Ill. 2d 100, 106, 477 N.E.2d 686, 689 (1985). The *sua sponte* dismissal of his complaint was proper. See *Hennings*, 229 Ill. 2d at 32, 890 N.E.2d at 928.

¶ 14 We further note the new arguments raised in Cookson's reply brief are improper. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued [in the appellant brief] are waived and shall not be raised in the reply brief ***."). Cookson set forth new challenges to his conviction in his reply brief. These arguments did not appear in either his *habeas corpus* complaint or in his opening brief. Under Rule 341(h)(7), we shall not consider them.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we affirm the trial court's judgment.

¶ 17 Affirmed.