

2017 IL App (1st) 152318-U  
No. 1-15-2318  
Order filed December 29, 2017

Fifth Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 97 CR 8785
	)	
DARRIN SMITH,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge, presiding.
	)	
	)	

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Post-conviction proceeding is sufficiently related to an underlying criminal case to meet the "matter in controversy" standard of Supreme Court Rule 63(C)(1)(b). Ill. S. Ct. R. 63(C)(1)(b) (eff. July 1, 2013). Trial court's denial of defendant's petition for leave to file a successive post-conviction petition reversed; cause remanded to Judge Ford to determine if he is the same person who represented the State during defendant's pretrial proceedings.

¶ 2 Defendant Darrin Smith appeals an order entered by circuit court Judge Nicholas Ford denying his motion for leave to file a successive petition for post-conviction relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2014).

¶ 3 On appeal, defendant contends that Judge Ford's order should be vacated and the matter remanded for a hearing before a different judge because Judge Ford previously served as the prosecutor during the pre-trial stages of his underlying criminal case while employed as an assistant State's Attorney (ASA) and was therefore disqualified from presiding over any aspect of this case at the post-conviction stage under Rule 63(C)(1) of the Illinois Code of Judicial Conduct. Ill. S. Ct. R. 63(C)(1) (eff. July 1, 2013).

¶ 4 The State, while conceding that Judge Ford previously appeared on its behalf as the prosecuting ASA in defendant's underlying criminal case and that it should be remanded, contends that the cause should merely be remanded back to Judge Ford to allow him to voluntarily recuse himself from the case under Rule 63(C)(1)(b).

¶ 5 Thus, the only question before this court is whether this matter should be remanded to a different judge or remanded back to Judge Ford for recusal.

¶ 6 **BACKGROUND**

¶ 7 Defendant was convicted of first degree murder and home invasion and sentenced to 60 years' imprisonment for murder, with a consecutive 10-year sentence for home invasion following a jury trial before Judge Toomin. This court affirmed defendant's conviction and sentence for murder, but reversed his home invasion conviction and remanded for a new trial on that issue. *People v. Smith*, No. 1-98-3959 (1999) (unpublished order under Supreme Court Rule 23). On remand, the State dismissed the home invasion charges. Subsequently, defendant filed

various post-conviction pleadings, which were denied, and those denials were affirmed on appeal. *People v. Smith*, No. 1-08-0321 (2009) (unpublished order under Supreme Court Rule 23). On March 17, 2015, defendant filed a motion for leave to file a successive post-conviction petition, along with the proposed petition. Judge Ford, who was assigned to hear defendant's post-conviction motion, denied defendant's motion for leave to file the successive petition, finding that defendant failed to establish the cause and prejudice required for a successive post-conviction petition. This timely appeal followed.

¶ 8

#### ANALYSIS

¶ 9 The parties to the instant case dispute the proper interpretation to be given to Rule 63(C)(1) of our Code of Judicial Conduct, which calls for a judge to disqualify himself in proceedings where his impartiality might reasonably be questioned, including those instances where the judge formerly "served as a lawyer in the matter in controversy." Ill. S. Ct. R. 63(C)(1)(d) (eff. July 1, 2013).

¶ 10 Rule 63 incorporates former Rule 67(c), which provided that a judge "shall not participate in any case in which he has previously acted as counsel." 87 Ill.2d R. 67(c) (1981).

¶ 11 Our Supreme Court's decision in *People v. Storms*, 155 Ill. 2d 498 (1993) is instructive to this matter. In that case, the supreme court interpreted Rule 63(C)(1) in the context of former Rule 67(c). Judge Trobe, who presided over the defendant's current proceedings in a 1989 criminal charge, had previously served as the ASA in defendant's prior 1980 criminal case. *Storms*, 155 Ill. 2d at 500.

¶ 12 The court noted, "in decisions where a trial judge was previously involved in the same criminal proceeding over which the judge eventually presided and in which the defendant was

found guilty, our courts have looked to the degree of this involvement." *Storms*, 155 Ill. 2d at 503. The court, in finding that the trial judge was not disqualified from the defendant's case, noted that "Rule 63 speaks to a judge's previous service 'in the matter in controversy.' Interpreted in its plain meaning, the phrase 'matter in controversy' has been held to encompass the case currently pending before the court." *Storms*, 155 Ill. 2d at 504. The matter in controversy was the defendant's present 1989 case, and since Judge Trobe was not an ASA in that case, he was not involved in the "matter in controversy" under Rule 63. *Storms*, 155 Ill. 2d at 504-05.

¶ 13 Subsequent to the supreme court's decision in *Storms*, two appellate court cases followed that raised similar issues. In *People v. Vasquez*, 307 Ill. App. 3d 670, 673 (1999), a post-conviction case, the defendant contended that he was entitled to a substitution of judges on remand because Judge Bridges participated as an ASA in the underlying criminal case. The court noted that while generally there is no absolute right to a substitution of judges at a post-conviction hearing, when a judge's impartiality might reasonably be questioned a judge shall disqualify himself or herself, including proceedings in which the judge served as a lawyer in the matter in controversy. *Vasquez*, 307 Ill. App. 3d at 673. The court noted, as stated by the supreme court in *Storms*, that "matter in controversy" means the case currently pending before the court, and a judge is not automatically disqualified if he or she represented the State in an unrelated prosecution. *Vasquez*, 307 Ill. App. 3d at 673, citing *Storms*, 155 Ill.2 d at 504. The court found that Judge Bridges actively participated as an ASA in the original prosecution of defendant, and while a post-conviction proceeding is not a direct appeal or continuation of a criminal case, it is "sufficiently related to the original prosecution that it falls within the scope of

Rule 63(C)(1)(b)." *Vasquez*, 307 Ill. App. 3d at 673-74. The court concluded that if Judge Bridges appeared for the State in this matter, Rule 63(C)(1)(b) disqualified him from further participation as a judge in the matter. *Vasquez*, 307 Ill. App. 3d at 674. The court directed Judge Bridges, on remand, to determine whether he was the same George Bridges who appeared as an ASA in this matter, and if he did appear for the State, he should recuse himself, and the matter should be reassigned. *Vasquez*, 307 Ill. App. 3d at 674.

¶ 14 Similarly, in *In re Detention of Hargett*, 338 Ill. App. 3d 669, 673 (2003), the court found that like a post-conviction proceeding, a petition for civil commitment is sufficiently related to the original prosecution that it falls within the scope of Rule 63(C)(1)(b). As such, the court found that if Judge Lustfeldt was involved in one of the underlying criminal cases, he should have recused himself. *Detention of Hargett*, 338 Ill. App. 3d at 673. The court noted that because Judge Lustfeldt appeared in court on behalf of the State during one of defendant's prior criminal prosecutions, it was sufficient evidence of involvement to require him to recuse himself and he committed reversible error by failing to recuse himself. *Detention of Hargett*, 338 Ill. App. 3d at 674.

¶ 15 We disagree with the State that the decision of *In re Marriage of O'Brien*, 2011 IL 109039 applies to the instant case, as that case involved the denial of a motion for substitution of judge in which the judge had previously presided over an evidentiary hearing in an earlier domestic battery case between the parties and had casual contact with the wife in her capacity as a part-time employee of the Judge's health club. The husband filed a motion for substitution of judges which was denied and the denial affirmed by the appellate court. *Marriage of O'Brien*, 2011 IL 109039, ¶ 13-14. The Supreme Court upheld the denial of the husband's motion, finding

that he failed to show actual prejudice in his motion for substitution of judges. *Marriage of O'Brien*, 2011 IL 109039, ¶ 30. The court also specifically noted the difference between recusal and substitution, and that Rule 63(C) only requires "an appearance of impropriety" standard. *Marriage of O'Brien*, 2011 IL 109039, ¶¶ 43-47.

¶ 16 We therefore find that the holding in *Storms* and its progeny govern this matter. This post-conviction proceeding is sufficiently related to the underlying criminal case to meet the "matter in controversy" standard. Moreover, the State, in its brief, concedes that Judge Ford served his entire career legal career as an ASA prior to becoming a judge. However, it is not clear whether he is the same "Nick Ford" that prosecuted the pretrial proceedings in defendant's case.

¶ 17 We therefore reverse the trial court's denial of defendant's petition for leave to file a successive post-conviction petition, and remand this matter to Judge Ford to determine if he is the same person who represented the State during defendant's pretrial proceedings. If so, then he should recuse himself and the matter be reassigned. See *Marriage of O'Brien*, 2011 IL 109039, ¶ 45; *Vasquez*, 307 Ill. App. 3d at 674.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and remanded with directions.

¶ 20 Reversed and remanded.