

NOTICE

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2018 IL App (4th) 160113-U

NO. 4-16-0113

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 11, 2018

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARQUELL LATTIMORE,)	No. 13CF564
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Harris and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by denying defendant’s motion for substitution of judge for cause without a hearing or without forwarding to another judge for consideration when defendant failed to comply with the statutory affidavit requirement.

¶ 2 Defendant, Marquell Lattimore, appeals from the circuit court’s *sua sponte* order dismissing his *pro se* postconviction petition as frivolous and patently without merit. However, he raises no issues with regard to his underlying conviction or the issues posed in his postconviction petition. Instead he claims the circuit court erred in denying his motion for substitution of judge. We affirm.

¶ 3 **I. BACKGROUND**

¶ 4 In April 2013, the State charged defendant with (1) aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2012)), a Class 2 felony, alleging he intentionally strangled his

girlfriend (count I), and (2) resisting or obstructing a peace officer (720 ILCS 5/31-1(a) (West 2012)), a Class A misdemeanor, alleging he struggled with a police officer during his arrest (count II). Defendant pleaded guilty to count I in exchange for the State's agreement to dismiss count II and recommend a sentence of 24 months' probation with 60 days in jail. In April 2013, the trial court, the Honorable Thomas J. Difanis presiding, accepted defendant's guilty plea as knowing and voluntary and sentenced defendant in accordance with the plea agreement.

¶ 5 In March 2015, the State filed a petition to revoke defendant's probation, alleging defendant willfully refused to pay his ordered fines, fees, and costs and failed to enroll in an anger-management program. In May 2015, following a stipulated probation-revocation hearing, the trial court proceeded to resentencing. The arresting officer, John McAllister, and another responding officer, Jedediah Mackey, testified about the circumstances occurring on the night of defendant's arrest in April 2013. McAllister arrested defendant and began walking him to the patrol car when defendant began struggling. Both officers were eventually able to secure defendant into the patrol car.

¶ 6 Officer Mackey testified about a subsequent incident involving defendant occurring in March 2015. He was dispatched to defendant's girlfriend's address for a violation of an order of protection. As Mackey was en route to the residence, he saw defendant walking through neighbors' yards. Mackey asked defendant to identify himself and to stop walking. Defendant gave a false name and refused to comply with the officer's command to stop. Once Mackey got close enough to defendant, he reached for defendant's arm. Defendant pulled it away, warning the officer not to touch him. A struggle ensued, and Mackey took defendant to the ground. To gain control of defendant, other responding officers used pepper spray and a baton, only for leverage, to release defendant's arm from underneath his body.

¶ 7 After considering various factors in aggravation and mitigation and other relevant information, including the presentence investigation report, the trial court resentenced defendant to seven years in prison. In pronouncing the sentence, Judge Difanis remarked as follows, while recounting defendant's criminal history and character:

“The bottom line is this is a very dangerous young man. He is dangerous to the women that come across him. He's dangerous to the police officers that come across him.

A community-based sentence would be totally inappropriate. It would deprecate the seriousness of his conduct and would be totally inconsistent [with] the ends of justice.”

Defendant filed a motion to reconsider his sentence, which the trial court denied. He appealed, and this court entered an agreed order. *People v. Lattimore*, No. 4-15-0538 (Feb. 28, 2017) (agreed order remanding with directions).

¶ 8 On December 7, 2015, defendant filed a *pro se* petition for postconviction relief, claiming he was “refuted due process, equal protection, and fundamental fairness under the law.” Upon further explanation of his claim, defendant asserted (1) actual innocence, (2) his sentence was excessive where the trial court failed to consider defendant's rehabilitative potential, (3) ineffective assistance of counsel, (4) Judge Difanis was biased against him by “improperly claiming he was fighting police and being a dangerous man to women and police that come before him,” and (5) his guilty plea was involuntary.

¶ 9 Also on December 7, 2015, defendant, citing section 114-5(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(d) (West 2014)), filed a *pro se* motion for substitution of judge for cause, alleging Judge Difanis was biased and prejudiced against him,

referring to defendant as “a dangerous person.” Further, defendant asked that Judge Difanis not preside over his postconviction proceedings since the judge (1) “will not accept the un rebuttable fact attested in the petition *** [that] he was improperly charged with an offense”; (2) sentenced him to a maximum term without justification; (3) failed to consider the victim’s recent communication with defendant; and (4) refused to continue defendant’s probation after he committed a “non-violent and non-criminal” violation of his probation. Defendant did not attach an affidavit to his motion.

¶ 10 On December 29, 2015, Judge Difanis entered an order summarily dismissing defendant’s *pro se* postconviction petition as frivolous and patently without merit. The judge did not take action on defendant’s motion for substitution of judge.

¶ 11 On January 11, 2016, defendant filed *pro se* motions to reinstate his motion for substitution of judge for cause, to reinstate his postconviction petition, and to reconsider the order dismissing his postconviction petition. On January 20, 2016, Judge Difanis entered the following docket entry: “Defendant’s motion for substitution of judge for cause, to reinstate and reconsider post-conviction petition are DENIED.”

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant contends the circuit court erred in denying his motion for substitution of judge for cause without a hearing and without forwarding to another judge for consideration. In his motion, defendant alleged Judge Difanis was prejudiced against him. Judge Difanis had presided over defendant’s guilty-plea hearing, revocation-of-probation hearing, and resentencing. Defendant’s primary allegation was that, at the resentencing hearing, Judge Difanis referred to defendant as a dangerous person. Because of the judge’s comment, as well as other grounds

alleged in his motion, defendant did not want Judge Difanis to preside over proceedings related to defendant's *pro se* postconviction petition.

¶ 15 A defendant seeking a substitution of judge for cause must comply with the statutory requirements set forth in section 114-5(d) of the Code (725 ILCS 5/114-5(d) (West 2014)), which provides:

“[A]ny defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion.”

¶ 16 We review defendant's claim in light of the above statutory language. As in all cases of statutory interpretation, our duty is to ascertain and give effect to the intent of the legislature. *Hadley v. Illinois Department of Corrections*, 224 Ill. 2d 365, 371 (2007). Statutory interpretation is an issue of law, subject to *de novo* review. *Hadley*, 224 Ill. 2d at 370.

¶ 17 Defendant's motion was not supported by an affidavit as required by statute. Illinois courts have consistently held that a defendant is *not* entitled to a substitution of judge where the motion contains conclusory allegations of prejudice and/or is unsupported by affidavit. See *People v. Brim*, 241 Ill. App. 3d 245, 248-49 (1993); *People v. Marshall*, 165 Ill. App. 3d 968, 975 (1987); *People v. Clay*, 124 Ill. App. 3d 140, 147 (1984); and *People v. Rice*, 108 Ill. App. 3d 344, 350-51 (1982). Defendant concedes his motion is not supported by affidavit, but he claims he alleged with specificity allegations and examples of Judge Difanis's bias and

prejudice. Therefore, he contends, his failure to attach an affidavit should not be fatal to his motion given that the statute is to be construed “liberally to protect [a] defendant’s right to a fair and impartial hearing[.]” *People v. Jones*, 197 Ill. 2d 346, 355 (2001).

¶ 18 Defendant further supports his contention by equating the affidavit requirement at issue here with the evidentiary affidavit requirement of section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2014)). Defendant relies on a supreme court’s decision which held that an unnotarized statement filed in support of the petitioner’s *pro se* postconviction petition should not have rendered the petition frivolous or patently without merit simply because the statement, styled as an evidentiary affidavit, was not notarized. *People v. Allen*, 2015 IL 113135, ¶ 34. Rather, as the court instructed, the circuit court should look to whether the evidentiary statement is capable of corroboration and identifies the sources, character, and availability of evidence alleged to support the petition’s allegations, *i.e.*, whether the statement satisfies the purpose of the evidentiary affidavit. *Allen*, 2015 IL 113135, ¶ 34.

¶ 19 Relying on *Allen*, defendant contends the failure to produce an affidavit in support of his motion to substitution of a judge for cause did not preclude him from “making a specific and non-conclusory allegation” of prejudice. He argues the affidavit requirement can be forgiven if, like in *Allen*, the purpose of the affidavit is otherwise served through alternate means, such as well-pleaded allegations.

¶ 20 We find defendant’s reliance on *Allen* is misplaced. The analysis in *Allen* centered on a petitioner’s ability to plead sufficient facts and allegations and the ability to support those pleadings and facts with sufficient corroborating evidence to avoid first-stage dismissal. *Allen*, 2015 IL 113135, ¶ 32. The *Allen* analysis is specific to the statutory mandates related to first-stage pleading requirements as set forth in the Post-Conviction Hearing Act (725 ILCS 5/122-2

(West 2014)), and should not be extended to generally apply to other affidavit requirements and, more specifically, to the statutory requirements of a motion for substitution of judge for cause.

¶ 21 Instead, our legislature and our supreme court have both clearly provided that a motion for substitution of a judge for cause be supported by affidavit. See 725 ILCS 5/114-5(d) (West 2014) (“any defendant may move at any time for substitution of judge for cause, supported by affidavit”), and *Jones*, 197 Ill. 2d at 355 (“a substitution for cause petition must be supported by an affidavit”). A liberal construction of section 114-5(d) does not relieve defendant of the affidavit requirement. See *Clay*, 124 Ill. App. 3d at 147 (“While it is true that section 114-5 is to be construed liberally [citation], the right to substitution is not absolute [citation], and in order to avail himself thereof, a defendant must comply with the applicable statutory provisions [citation]—one of which, as noted above, is that under section 114-5(c) a motion for substitution for cause must be supported by affidavit [citation].”) See also *People v. Flynn*, 341 Ill. App. 3d 813, 824 (2003) (while the statute is to be liberally construed, it should not be interpreted so as to contravene its express affidavit requirement).

¶ 22 Defendant has provided no basis upon which this court may excuse the lack of supporting affidavit. As such, we conclude Judge Difanis did not err in denying defendant’s motion for substitution of judge for cause without hearing and without forwarding to another judge for consideration.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court’s judgment denying plaintiff’s motion for substitution of judge for cause.

¶ 25 Affirmed.