2018 IL App (5th) 150150-U

NO. 5-15-0150

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 01-CF-1062
	)	
JERAMEY BROWN,	)	Honorable
	)	Ronald R. Slemer,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant made a substantial showing of a constitutional violation in alleging a potential conflict of interest by a former member of this court in a previous appeal, entitling him to a third-stage evidentiary hearing on his petition for postconviction relief.

¶ 2 Defendant, Jeramey Brown, appeals from a judgment of the circuit court of Madison County dismissing his petition for postconviction relief at the second stage. On appeal, defendant contends that his petition alleged a potential conflict of interest by a former member of this court in his previous appeal, *People v. Brown*, 2012 IL App (5th) 080373-U (*Brown II*), and provided the requisite showing of a constitutional violation. Defendant asks us to either (1) vacate our decision in *Brown II* and remand for a new

direct appeal or (2) reverse the circuit's order dismissing his petition and remand for a third-stage evidentiary hearing. After careful consideration, we reverse and remand for a third-stage evidentiary hearing.

¶ 3 FACTS

¶ 4 On April 2, 2003, a jury found defendant guilty of first-degree murder for his role in the stabbing death of Michael Keller and found that the slaying had been accompanied by brutal and heinous behavior, indicative of wanton cruelty. Defendant was then sentenced to 75 years in prison. On direct appeal, we concluded defendant was denied effective assistance of counsel, and we reversed and remanded for a new trial. *People v. Brown*, 358 Ill. App. 3d 580 (2005) (*Brown I*). For purposes of this appeal, it is important to note that attorney Trent M. Marshall was one of the appellate prosecutors in defendant's first direct appeal. Marshall was a staff attorney at the Office of the State's Attorneys Appellate Prosecutor in Mt. Vernon. *Id.* at 581.

¶ 5 On retrial, a jury again found defendant guilty of first-degree murder and determined that the murder was accompanied by brutal and heinous behavior. The trial court imposed a sentence of 75 years in prison. We affirmed pursuant to an unpublished order in *Brown II*, finding the case against defendant "overwhelming." Justice James Wexstten, who is now retired, was a concurring justice in *Brown II*. Trent M. Marshall was one of Justice Wexstten's law clerks at the time of the concurrence. Marshall, as previously noted, was an appellate prosecutor in *Brown I*.

¶ 6 Defendant filed a petition for rehearing in *Brown II*, which was denied on April 23, 2012. On April 25, 2012, Stephen Becker, a private attorney, filed a combined motion to substitute counsel, to withdraw the rehearing petition, and for leave to file a new rehearing petition. That motion alleged that the "pending" petition for rehearing omitted a "critical legal issue" that was "potentially outcome determinative of the current appeal." After recognizing that this court denied his petition for rehearing prior to attempting to withdraw his petition, defendant filed a motion to vacate and reassign the appeal to a separate panel. Defendant argued that our decision in *Brown II* was void because Marshall was the lead staff attorney in *Brown I* and, therefore, Justice Wexstten was disqualified from hearing the appeal because Marshall was now his law clerk.

¶ 7 On June 12, 2012, this court denied defendant's motions. Defendant then filed a motion for supervisory order with our supreme court, captioned *Brown v. Wexstten*, in which he alleged the Trent Marshall conflict. Defendant asked the court to address the issue on its own or remand to this court for a substantive determination. Our supreme court denied the motion on October 10, 2012.

¶ 8 On May 23, 2013, defendant filed the instant petition for postconviction relief in the circuit court pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). The case advanced to the second stage. On May 27, 2014, the State filed a motion to dismiss in which it asserted that the alleged Trent Marshall/Justice Wexstten conflict was barred pursuant to the doctrine of *res judicata* or waiver. On April 7, 2015, the circuit court granted the motion to dismiss on the basis that the conflict issue

was previously raised both before this court and our supreme court and "this is done." Defendant now appeals.

¶ 9 ANALYSIS

¶ 10 Defendant argues he made a substantial showing of a constitutional violation in his postconviction petition by pointing out the conflict created by Trent M. Marshall working as an appellate prosecutor in *Brown I* and then as a law clerk for Justice Wexstten when Wexstten concurred in *Brown II*. Defendant asks us to reverse and remand for a new direct appeal or, in the alternative, for a third-stage evidentiary hearing. The State responds: (1) the plain language of the Act bars defendant from seeking relief under the statute; (2) the trial court has no authority under the Act to order this court to vacate its decision and decide defendant's appeal anew; and (3) defendant's claim of conflict of interest was speculative and inadequate to state a substantial claim of constitutional error. After careful consideration, we find that defendant's postconviction petition is an appropriate vehicle that not only presents the gist of a constitutional claim but also requires that the petition be advanced to the third stage for an evidentiary hearing.

¶ 11 I. *RES JUDICATA*/WAIVER NOT APPLICABLE

¶ 12 The Act provides a method by which a person under criminal sentence can assert that his or her conviction was the result of a substantial denial of his or her rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a)(1) (West 2012). The purpose of a postconviction proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not and could not

have been determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). The Act provides for up to three stages of postconviction proceedings. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006).

¶ 13 At the first stage, the circuit court must, within 90 days of filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); 725 ILCS 5/122-2.1(a)(2) (West 2012). If the circuit court does not dismiss the petition as either frivolous or patently without merit, then the petition advances to the second stage where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2012)) and where the State is allowed to file a motion to dismiss or an answer to the petition (*id.* § 122-5). *Edwards*, 197 Ill. 2d at 246.

¶ 14 In order to survive a second-stage dismissal, the petitioner must make a substantial showing of a constitutional violation. *People v. Quigley*, 365 Ill. App. 3d 617, 618 (2006). The circuit court must accept as true all of the petition's well pleaded facts. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). If a substantial showing is not made, the petition is dismissed; if a substantial showing is made, the proceeding advances to the third stage in which the circuit court conducts an evidentiary hearing. *Id.* at 381-82.

¶ 15 In a postconviction proceeding, "[i]ssues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*." *People v. Harris*, 206 Ill. 2d 1, 12 (2002). And "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Defendant's conflict claim

was not raised on direct appeal because no one even knew there was a potential problem until after we decided *Brown II* and someone discovered that Trent Marshall was now working as a clerk for Justice Wexstten. Even our supreme court's denial of a supervisory order in *Brown v. Wexstten* does not constitute *res judicata* and prevent him from moving forward with his conflict claim because the issue was never fully developed.

¶ 16 The record before us is clear that the circuit court dismissed defendant's petition at the second stage before an evidentiary hearing was conducted. The relevant question, therefore, is whether defendant's petition makes a substantial showing of a constitutional violation. We review a circuit court's dismissal of a postconviction petition under the *de novo* standard. *Coleman*, 183 Ill. 2d at 388.

¶ 17 II. CONSTITUTIONAL VIOLATION

¶ 18 In Illinois, a criminal defendant has a right to appeal his or her conviction. Ill. Const. 1970, art. VI, § 6. And while there is no corresponding federal right to take an appeal, there is a fourteenth amendment due process right that appeals should be decided fairly. U.S. Const., amend. XIV. A fair trial in a fair tribunal is a basic requirement of the due process clause, and matters relating to judicial disqualification can rise to a constitutional level. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). As a matter of due process, a judge must recuse himself or herself from a case where a judge's hearing that case would create the appearance of partiality. *In re Murchison*, 349 U.S. 133, 136 (1955).

¶ 19 Rule 63(C)(1) of our Code of Judicial Conduct provides in pertinent part as follows:

> "C. Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> ***
>
> (b) the judge served as a lawyer in the matter in controversy ***."
>
> Ill. S. Ct. R. 63(C)(1)(b) (eff. Feb. 2, 2017).

The United States Supreme Court has determined that "[w]here a judge has had earlier significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Williams v. Pennsylvania*, 579 U.S. ___, ___, 136 S. Ct. 1899, 1910 (2016).

¶ 20 Defendant directs our attention to *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), where a law clerk's bias was imputed to the judge for whom she clerked. In *Hall*, the plaintiff filed a class action against the defendant employer, alleging she and other female employees were discriminated against in violation of Title VII. *Id.* at 177. The case was tried before a magistrate, whose sole law clerk previously worked for the defendant employer and resigned due to allegations of discrimination. *Id.* at 176, 178. The law clerk was also a member of the plaintiff's certified class (*id*. at 177) and had

accepted employment with plaintiff's counsel (*id*. at 176). Despite the law clerk's ties to the litigation, she participated in pretrial proceedings, attended the trial and took notes, and worked on the final opinion in the case immediately before she left her clerkship. *Id*. at 178. Under those circumstances, the magistrate's failure to disqualify himself was error (*id.* at 175), because regardless of "[w]hether or not the law clerk actually affected the magistrate's decision, her continuing participation with the magistrate in a case in which her future employers were counsel gave rise to an appearance of partiality" (*id*. at 179).

¶ 21 *Hall* specifically states:

> "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries." *Id*. at 176.

While *Hall* "does not create a mandatory rule requiring the recusal of the judge whenever a law clerk employed by that judge has a real or possible conflict of interest" (*Baugh v. City of Milwaukee*, 829 F. Supp. 274, 275 (E.D. Wis. 1993)), if a judge's impartiality "might reasonably be questioned" in a judicial proceeding, then Rule 63(C)(1) requires the judge to disqualify himself or herself. Here, a reasonable observer could call into question our impartiality in *Brown II*, given the potential conflict created by Trent Marshall's participation in *Brown I* and potentially *Brown II*.

¶ 22 III. POSTCONVICTION PETITION

¶ 23 A major point of contention in this appeal is whether a postconviction petition is the appropriate vehicle for defendant to raise his claim since the petition sounds in a structural defect of a constitutional dimension that occurred in the reviewing court rather than the trial court or any attorney representing defendant in either the trial court or the reviewing court. According to the State, unless the alleged error occurred in the circuit court, the Act fails to provide a remedy. We disagree.

¶ 24 In support of our determination we point to section 122-2.1(c) of the Act, which specifically states, "In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, *any action taken by an appellate court in such proceeding* and any transcripts of such proceeding." (Emphasis added.) 725 ILCS 5/122-2.1(c) (West 2012)). Thus, the very language of the Act contemplates considering actions taken by an appellate court. Additionally, it is well settled "that the Act must be liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights." *People v. Correa*, 108 Ill. 2d 541, 546 (1985) (citing *People v. Pier*, 51 Ill. 2d 96, 98 (1972)).

¶ 25 We also rely on *Price v. Philip Morris, Inc*., 2015 IL 117687, in finding that a postconviction petition is an appropriate vehicle in which to raise defendant's conflict challenge. *Price* was a civil case, not a criminal case, and involved a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) (*Price*, 2015 IL 117687, ¶ 1), yet it is instructive here. In *Price*, the judgment from which relief was sought was a prior decision of our supreme court.

The *Price* court held "that section 2-1401 does not authorize the circuit court to grant collateral relief from the judgment of a reviewing court." *Price*, 2015 IL 117687, ¶ 45. This determination was based upon the hierarchical structure of our courts. *Id*. ¶ 38.

¶ 26 *Price* noted that our constitution "creates a three-tiered court system, with the appellate court sitting in review of the circuit courts, and the supreme court sitting in review of the appellate and circuit courts. Ill. Const. 1970, art. VI." *Id*. The core principle that flows from the hierarchical structure of our courts is that if our supreme court declares law on any point, it alone can overrule and modify its previous decision, and the lower courts are bound to follow such a decision. *Id.* Nevertheless, *Price* realized that "a litigant seeking relief from a reviewing court's judgment" cannot be meant to be left "without a remedy" (*id*. ¶ 42) and "[a]ppellate courts 'are recognized to have an inherent power to recall their mandates' " (*id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 549 (1998))).

¶ 27 Our supreme court specifically stated:

> "As we have explained, plaintiffs and other similarly situated litigants have a remedy: they may file a motion, pursuant to Illinois Supreme Court 361 (eff. Jan. 1, 2015), to recall the mandate in the reviewing court in which the contested judgment was rendered. This remedy permits 'justice and fairness' to be achieved, and it does so in a way that does not require ceding the authority of reviewing courts to the circuit courts. There is no need, therefore, to embrace an

interpretation of section 2-1401, as the dissent does, that upends the judicial hierarchy and that flies in the face of common sense." *Id.* ¶ 70.

Price went on to note, however, that because the plaintiffs failed to move to recall the mandate and "we have no briefing or argument on how the standards applicable to a motion to recall the mandate would apply," "we decline to *sua sponte* recast plaintiffs' section 2-1401 petition as a motion to recall the mandate." *Id.* ¶ 71. But it is clear that our supreme court left open the possibility that such a motion could be filed in the future and ruled upon. *Id.*

¶ 28 Relying on *Price*, we find the defendant's postconviction petition is an appropriate means of advancing the potential Marshall/Wexstten conflict claim. Defendant simply must have some recourse if a conflict occurred in *Brown II*. We, of course, are not a court of original jurisdiction, so determining whether a conflict occurred involves findings more appropriately made by the circuit court. In determining whether an evidentiary hearing is warranted on a petition for postconviction relief, all well-pleaded facts are taken as true. *People v. Doggett*, 255 Ill. App. 3d 180, 185 (1993).

¶ 29 Here, contrary to the State's assertions, we believe defendant has made a substantial showing of a violation of a constitutional right, and he is entitled to a third-stage evidentiary hearing on the matter. The record clearly shows that Trent Marshall was an appellate prosecutor in *Brown I* and worked as a law clerk for Justice Wexstten at the time he concurred in *Brown II.* On remand, the trial court will be limited to making findings as to whether an actual conflict occurred. It is possible Trent Marshall took no part in *Brown II*.

¶ 30 At this stage, we simply do not know whether Marshall was involved in *Brown II* or not. If Marshall was involved, we need to know the degree of his involvement and whether or not any conflict occurred as a result of his involvement.

¶ 31 After making a finding on the conflict issue, the finding needs to be conveyed to this court. Pursuant to *Price*, if the trial court's findings are adverse to the State, a petition to recall our mandate in *Brown II* would be appropriate. We also point out that as a practical matter, this would likely require another appeal, at which point a new panel would determine whether the trial court's findings were appropriate.

¶ 32 CONCLUSION

¶ 33 Because defendant made a substantial showing of a constitutional violation, the proceeding should advance to the third stage. Accordingly, we reverse the judgment of the circuit court of Madison County and remand for a third-stage evidentiary hearing.

¶ 34 Reversed and remanded with directions.