2019 IL App (4th) 170251-U

NO. 4-17-0251

FILED
January 24, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DAVID K. ANDERSON,	)	No. 10CF1192
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices DeArmond and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly denied defendant's *pro se* (1) petition for postconviction relief at the first stage of the postconviction proceeding, (2) motion for reconsideration, and (3) motion for substitution of judge. The appellate court lacked jurisdiction to rule on defendant's motion for change of venue.

¶ 2 In January 2017, defendant, David K. Anderson, filed a *pro se* petition for postconviction relief alleging 39 claims, including, in relevant part, allegations of judicial bias. Subsequently, the trial court summarily dismissed the *pro se* postconviction petition, concluding the petition was barred by *res judicata* and was frivolous and patently without merit.

¶ 3 In March 2017, defendant filed *pro se* motions (1) for reconsideration of the postconviction petition's dismissal, alleging in part that the trial judge should have recused himself from the postconviction proceedings, and (2) for substitution of judge. The trial court denied the motions. Subsequently, defendant filed a *pro se* motion for change of venue, alleging

the trial judge should have recused himself from the postconviction proceedings and requesting further proceedings before a court outside the judge's "control" or "influence." The trial court denied the motion for change of venue. Defendant then filed a *pro se* notice of appeal from the "denial" of his postconviction petition and the orders denying his motions for reconsideration and for substitution of judge.

¶ 4 Defendant appeals, asserting (1) judicial bias on the part of the trial judge and error in his failure to recuse himself from postconviction proceedings and (2) the trial court improperly dismissed defendant's *pro se* postconviction petition at the first stage of the postconviction proceeding. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Trial Court Proceedings

¶ 7 In July 2010, the State charged defendant with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14/1(a)(1) (West 2010)) and four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)), alleging defendant, a family friend, touched P.C.—a minor under the age of 13—on the vagina and on the buttocks.

¶ 8 In November 2010, pursuant to section 115-10(d) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10(d) (West 2010)), the prosecution served on the defendant a notice of intent to present hearsay evidence in the upcoming trial. According to the notice, the hearsay evidence would be "out-of-court statements of the minor [P.C.] to Heather Forrest and Joseph Ferry on July 14, 2010[,] and to her mother[,] Kassandra L[.], as provided in discovery." The trial court held a hearing to determine whether "the time, content, and circumstances of the[se] statement[s] provide[d] sufficient safeguards of reliability[.]" 725 ILCS 5/115-10(b)(1) (West 2010). At the beginning of the hearing, the court stated it had "been

provided a dis[c] of the child advocacy interview" and that it had reviewed the interview. The court then heard evidence.

¶ 9 The prosecutor called Heather Forrest as a witness. Forrest testified she worked for the Illinois Department of Children and Family Services (DCFS) since 1998 and was currently a child protection investigator. On July 14, 2010, around 9 a.m., in the Child Advocacy Center, Forrest interviewed five-year-old P.C. In the interview, P.C. told Forrest that her landlord, Dave, touched her, and P.C. described the touching. Forrest watched the compact digital disc recording of the interview and verified the recording's accuracy. Forrest was the only witness to testify in the section 115-10 hearing.

¶ 10 After hearing the evidence, the trial court ruled:

> "The court reviewed the dis[c] of the interview that Ms. Forrest conducted. The interview, the questions were open-ended questions. They weren't leading. The child appeared to be bright and somewhat articulate for her age. Given all that was available on the dis[c], the training that Ms. Forrest has had, the court finds that the time, content[,] and circumstances of the statement provide sufficient safeguards of reliability. Should the child testify, then this exhibit, this tape will be made available to the jury."

¶ 11 The prosecutor made no argument, and the trial court made no ruling, regarding the other hearsay statements listed in the State's notice, namely, the "out-of-court statements of the minor [P.C.] to *** Joseph Ferry on July 14, 2010[,] and to her mother[,] Kassandra L."

¶ 12 At a December 2010 jury trial, the State called the five-year-old victim, P.C., among other witnesses, including her eight-year-old sister, to testify. P.C. indicated defendant

touched her on the vagina and on the buttocks. The State also played the video recording where P.C. told investigator Forrest that defendant touched her "inside of her body on the back" and that he rubbed her "pee pee."

¶ 13 The jury found defendant guilty of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). After the jury returned its guilty verdicts, defendant, while still represented by appointed counsel, filed several *pro se* motions, including a motion for a new trial, in which he accused his trial counsel of rendering ineffective assistance.

¶ 14 During a posttrial hearing in January 2011, the trial court questioned trial counsel regarding the *pro se* claims of ineffective assistance, and the prosecutor added his input on the claims. During the court's conversation with trial counsel, defendant ventured to say, "Excuse me, Your Honor?" and the court responded, "Be quiet." The court found no possible neglect of the case and proceeded to the sentencing hearing. The trial court sentenced defendant to consecutive terms of 30 years' imprisonment for each count.

¶ 15 B. The *Krankel* Proceedings

¶ 16 Defendant appealed on a single ground: that the trial court violated *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), and its progeny by failing to make an adequate preliminary inquiry into his allegations of ineffective assistance—allegations he made in a *pro se* motion for a new trial. In August 2012, we remanded this case for a new preliminary inquiry under *Krankel* to clarify ambiguities that emerged in the prior preliminary inquiry. *People v. Anderson*, 2012 IL App (4th) 110275-U, ¶ 17.

¶ 17 In October 2012, on remand, the trial court held a new preliminary *Krankel* inquiry, during which it invited participation from the State. The prosecutor performed a direct

examination of trial counsel, eliciting testimony in support of the State's position that, contrary to defendant's *pro se* claim, trial counsel did not render ineffective assistance. After the State's direct examination of trial counsel, the trial court told defendant he could cross-examine trial counsel and make a statement if he wished to do so. Defendant asked a few questions of trial counsel before attempting to explain his claim of ineffective assistance to the court. In June 2014, we found the second preliminary inquiry sufficient and affirmed the trial court's decision not to appoint new counsel. *People v. Anderson*, 2014 IL App (4th) 120960-U, ¶ 1.

¶ 18 Defendant petitioned for rehearing, pointing out that we overlooked an issue regarding void fines that he raised. In August 2014, we granted the petition for rehearing, and in a subsequent brief, defendant called our attention to the adversarial nature of the second preliminary hearing, which, according to *People v. Jolly*, 2013 IL App (4th) 120981, ¶ 48, 999 N.E.2d 735, and *People v. Fields*, 2013 IL App (2d) 120945, ¶ 41, 997 N.E.2d 791, should be neither adversarial nor evidentiary. Then, in December 2014, the supreme court issued an opinion holding that if a trial court permitted the State's adversarial participation in a preliminary inquiry pursuant to *Krankel*, the error could not be regarded as harmless (*People v. Jolly*, 2014 IL 117142, ¶ 40, 25 N.E.3d 1127), but rather, the error was reversible (*id.* ¶ 41). Consequently, we remanded this case for a third preliminary inquiry. *People v. Anderson*, No. 4-12-0960, slip order at 2 (Dec. 19, 2014) (summary order under Illinois Supreme Court Rule 23(c)(2) (eff. July 1, 2011)).

¶ 19 In August 2015, the trial court held a third preliminary inquiry into defendant's allegations for ineffective assistance. Defendant asserted that his trial counsel failed to defend the case when the prosecution changed its intended course of prosecuting the case and that defendant's trial counsel failed to prepare defense witnesses. After hearing defendant's

testimony, the trial court commented it was unclear how the prosecution changed its course, and, as for the preparation of defense witnesses, the court remarked that it found trial counsel more credible than defendant. We affirmed the trial court's judgment. *People v. Anderson*, 2016 IL App (4th) 150649-U, ¶ 94.

¶ 20 C. Postconviction Proceedings

¶ 21 In January 2017, defendant filed a *pro se* petition for postconviction relief, asserting 39 claims, including, in relevant part, allegations of judicial bias. Subsequently, the trial court summarily dismissed the *pro se* postconviction petition, concluding the petition was barred by *res judicata* and was frivolous and patently without merit.

¶ 22 In March 2017, defendant filed *pro se* motions (1) for reconsideration of the postconviction petition's dismissal, alleging in part that the trial judge should have recused himself from the postconviction proceedings and (2) for substitution of judge. The trial court denied both motions. Subsequently, defendant filed a *pro se* motion for change of venue, alleging the trial judge should have recused himself from the postconviction proceedings and requesting further proceedings before a court outside the judge's "control" or "influence." The trial court denied the motion for change of venue. Defendant then filed a *pro se* notice of appeal from the "denial" of his postconviction petition and the orders denying his motions for reconsideration and for substitution of judge.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant asserts (1) judicial bias on the part of the trial judge and his failure to recuse himself from postconviction proceedings and (2) the trial court improperly

dismissed defendant's *pro se* postconviction petition at the first stage of postconviction proceedings. For the following reasons, we affirm.

¶ 26 A. Judicial Bias

¶ 27 Defendant asserts the trial judge should have recused himself from the proceedings on the postconviction petition, the motion for reconsideration, the motion for substitution of judge, and the motion for change of venue. The State argues defendant fails to assert any evidence that would indicate bias or partiality on the trial judge's part or that the judge had a duty to recuse himself. We agree with the State.

¶ 28 "Illinois statutory provisions relating to substitutions of judges and changes of venue do not apply in post-conviction proceedings." *People v. Thompkins*, 181 Ill. 2d 1, 22, 690 N.E.2d 984, 994 (1998). "[T]he same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced." *People v. Hall*, 157 Ill. 2d 324, 331, 626 N.E.2d 131, 133 (1993). To establish "substantial prejudice," a defendant must show the trial judge holds ill will, hostility, distrust, animosity, or prejudice toward defendant. *People v. Reyes*, 369 Ill. App. 3d 1, 25, 860 N.E.2d 488, 510 (2006). "[O]nly under the most extreme cases is disqualification on the basis of bias or prejudice constitutionally required." *Thompkins*, 181 Ill. 2d at 22.

¶ 29 A judge must recuse himself from postconviction proceedings when he (1) has knowledge outside the record concerning the truth or falsity of allegations made, (2) may be called as a material witness, and (3) has a direct, personal, and substantial pecuniary interest in the case. *Id.* The Code of Judicial Conduct also requires judges to recuse themselves if their impartiality might be reasonably questioned. Ill. S. Ct. R. 63(C)(1)(a) (eff. Feb. 2, 2017) (where a judge has personal bias or prejudice concerning a party or party's lawyer). The judge is in the

best position to determine whether he can be impartial. *People v. Harvey*, 379 Ill. App. 3d 518, 522, 884 N.E.2d 724, 729 (2008). Therefore, "[t]he trial judge's decision will not be reversed absent an abuse of discretion." See *People v. Kliner*, 185 Ill. 2d 81, 169, 705 N.E.2d 850, 894 (1998) (citing *People v. Wilson*, 37 Ill. 2d 617, 621, 230 N.E.2d 194, 197 (1967) (holding the judge abused his discretion in failing to recuse himself from proceedings on the postconviction petition)).

¶ 30 Before we address the issue of judicial bias, we note this court lacks jurisdiction to review the denial of defendant's motion for change of venue. Defendant's motion for change of venue was not a final order and was not specified in defendant's notice of appeal filed in March 2017. See *People v. Peterson*, 397 Ill. App. 3d 1048, 1057, 923 N.E.2d 890, 897-98 (2010). Defendant's notice of appeal listed the denial of his postconviction petition, motion for reconsideration, and motion for substitution of judge but failed to include his motion for change of venue. Also, defendant filed his motion for change of venue after the trial court ruled on the postconviction petition, motion for reconsideration, and motion for substitution of judge. Therefore, the motion was not part of the procedural progression. See *In re A.N.*, 324 Ill. App. 3d 510, 511-12, 755 N.E.2d 155, 157 (2001) (holding this court had jurisdiction to review the denial of a motion for substitution of judge, although not a final order and not specified in the notice of appeal, because it was a step in the procedural progression leading to the specified judgment over which it had jurisdiction).

¶ 31 Defendant argues the trial judge should have recused himself from postconviction proceedings because his *pro se* postconviction petition alleged judicial bias and put the judge on notice that he "was a potential witness in the upcoming proceeding." Defendant asserts nine allegations from his *pro se* postconviction petition to support his argument for judicial bias: (1)

in his absence, the trial court *sua sponte* converted a motion to dismiss for violation of a right to speedy trial into a motion for speedy trial; (2) the court's *ex parte* communications with the State and the trial court's receipt and consideration of extrinsic evidence in preparation for the section 115-10 hearing; (3) the court denied defendant's right to a public trial by closing the courtroom to the public for the testimony of the alleged victim; (4) the court denied defendant's right to a public trial by allowing the courtroom to remain closed to the public for the testimony of the alleged victim's older sister; (5) the court denied defendant the right to hire counsel of choice; (6) the court denied defendant the right to self-representation; (7) the court denied defendant the right to participate in posttrial proceedings; (8) the court denied defendant a lawful court-ordered *Krankel* hearing; and (9) the court denied defendant a lawful second court-ordered *Krankel* hearing.

¶ 32 Here, defendant fails to allege—and the record fails to reveal—any of the limited circumstances in which a judge should recuse himself because of bias or prejudice. See *Thompkins*, 181 Ill. 2d at 22. Defendant's nine allegations of judicial bias assert error in the trial judge's prior rulings in the case. The Illinois Supreme Court has held "[a] judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality." *Eychaner v. Gross*, 202 Ill. 2d 228, 280, 779 N.E.2d 1115, 1146 (2002).

¶ 33 Defendant also asserts bias where the trial judge cut defendant off, told him to "[b]e quiet[,]" and questioned defendant's credibility. "The fact that a judge displays displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel." *People v. Urdiales*, 225 Ill. 2d 354, 426, 871 N.E.2d 669, 711 (2007). The judge found defense counsel more credible than defendant. The court's assessment of

credibility is within its purview and does not show bias. *In re Estate of Wilson*, 238 Ill. 2d 519, 555, 939 N.E.2d 426, 447 (2010).

¶ 34 Absent is any showing indicating bias or partiality on the trial judge's part. His contention that the judge could explain the reasons for his rulings does not transform the judge into a potential witness. *Eychaner*, 202 Ill. 2d at 280 (alleged error in trial court's findings and rulings does not constitute a valid basis for finding judicial bias). Defendant's allegations that the trial judge repeatedly disregarded the law and made intentional "structural errors" fail to constitute a showing of bias.

¶ 35 Defendant also argues the trial judge should have recused himself from proceedings following the dismissal of his *pro se* postconviction petition because his motion for reconsideration and motion for substitution of judge also alleged judicial bias. Specifically, defendant argues (1) after the filing of the motions, the judge had no authority to participate and (2) any actions of the judge after the denial of the motion for substitution of judge were void. Defendant relies on section 114-5 of the Code to support his argument. 725 ILCS 5/114-5(a) (West 2016) ("[Upon the filing of] a motion for [substitution of judge] the court shall proceed no further in the case but shall transfer it to another judge not named in the motion.").

¶ 36 As stated above, Illinois statutory provisions relating to substitution of judge are inapplicable to postconviction proceedings. *Thompkins*, 181 Ill. 2d at 22. Unless defendant establishes he would be substantially prejudiced, the trial judge is the proper authority to preside over the postconviction proceedings. *Hall*, 157 Ill. 2d at 331. Defendant failed to show prejudice in the form of judicial bias. Thus, the judge was not required to transfer the motions to another judge for consideration.

¶ 37 In defendant's motions, he asserted only allegations of bias or prejudice involving judicial rulings. See *Eychaner*, 202 Ill. 2d at 280. Therefore, defendant failed to allege, in his motion for reconsideration or his motion for substitution of judge, a basis to find judicial bias. Under these circumstance, the trial judge had no duty to recuse himself, meaning his failure to do so was not an abuse of discretion.

¶ 38 B. *Pro Se* Postconviction Petition

¶ 39 Defendant argues the trial court improperly dismissed his *pro se* postconviction petition at the first stage of the postconviction proceeding. Specifically, defendant asserts his petition (1) is "technically sufficient" in that it alleges facts and includes supporting documentation or an explanation for its absence; (2) could not be dismissed based on *res judicata*; (3) is not frivolous or patently without merit; (4) alleges 14 claims (petition issues II-XVII) supported in law and in fact; and (5) alleges other meritorious claims he cannot address on appeal due to space limitations.

¶ 40 A postconviction petition may be dismissed at the first stage of postconviction proceedings if it is " 'frivolous or is patently without merit. ' " *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010)(quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). A petition is frivolous or patently without merit if it lacks an arguable basis in law or fact. *Id.* "Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited." *People v. English*, 2013 IL 112890, ¶ 22, 987 N.E.2d 371 (citing *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010)). An issue raised for the first time in defendant's reply brief on appeal is subject to forfeiture. *Id.* ¶ 18. "[W]here *res judicata* and forfeiture preclude a defendant from obtaining

relief, such a claim is necessarily 'frivolous' or 'patently without merit.' " *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 616 (2005).

¶ 41 Claims otherwise barred by *res judicata* or forfeiture may proceed where (1) fundamental fairness so requires; (2) the alleged forfeiture stems from the incompetence of appellate counsel; or (3) facts relating to the claim do not appear on the face of the original appellate record. *Id.* at 450-51. The first-stage dismissal of a postconviction petition is a legal question reviewed *de novo*. *Petrenko*, 237 Ill. 2d at 496.

¶ 42 We find defendant has forfeited all of the petition's claims (II-XVII) except his subclaim that section 115-10(b)(2)(A) of the Code (725 ILCS 5/115-10(b)(2)(A) (West 2016)) is void on its face. Because defendant failed to raise his claims on direct appeal, we honor his forfeiture. See *English*, 2013 IL 112890, ¶ 22. While defendant asserted appellate counsel rendered ineffective assistance on direct appeal, he failed to raise the claim in his opening brief, and we do not find his one-sentence reference to the claim in his reply brief sufficient to preserve the issue for appeal. See *id.* ¶ 18. We will not address the other meritorious claims defendant failed to raise on appeal. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 45, 962 N.E.2d 528. We find forfeiture is proper where defendant does not assert fundamental fairness or that facts relating to any claim do not appear on the face of the original appellate record. See *Blair*, 215 Ill. 2d at 450-51.

¶ 43 Although defendant did not raise the issue on direct appeal, defendant's assertion that section 115-10(b)(2)(A) is void on its face is exempt from forfeiture. *People v. Thompson*, 2015 IL 118151, ¶ 32, 43 N.E.3d 984 ("[A] voidness challenge that is exempt from forfeiture and may be raised at any time involves a challenge to a final judgment based on a facially unconstitutional statute that is void *ad initio*."). Defendant argues section 115-10(b)(2)(A) is

void where the testimony shall only be admitted if the child "testifies at the proceeding" is ambiguous, in that "proceeding" could refer to the trial or the 115-10 hearing. We find defendant's claim lacks any arguable basis in law. In *People v. Back*, 239 Ill. App. 3d 44, 53, 605 N.E.2d 689, 696 (1992), this court found "Illinois case law reveals no instances when the child was required to testify at both the reliability hearing and the trial." " 'Proceeding,' as contemplated by the legislature, and evident from the purpose of the reliability hearing, refers to trial proceedings, not the reliability hearing." *Id.*

¶ 44 We find the trial court properly dismissed defendant's *pro se* postconviction petition where the petition's claims (II-XVII) lacked substantive merit and are frivolous and patently without merit.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the trial court's judgment. As part of our judgment we award the State its $50 statutory assessment against defendant as costs for this appeal. 55 ILCS 5/4-2002(a)(West 2016).

¶ 47 Affirmed.