

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 7, 2020

FILED

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Clerk of the
Appellate Courts

JOE JACKSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-00783 Lee V. Coffee, Judge

No. W2019-00731-CCA-R3-PC

Pro se petitioner, Joe Jackson, appeals from the summary dismissal of his petition for post-conviction relief arguing, inter alia, that the post-conviction court erred in (1) dismissing his petition without a hearing; and (2) denying his motion to recuse. Upon our review, we reverse the judgment of the post-conviction court and remand this matter for proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed
and Remanded for Evidentiary Hearing**

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Joe Jackson, Clifton, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Katherine K. Decker, Assistant Attorney General; Amy Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

A jury convicted the Petitioner of aggravated assault and reckless endangerment, for which he received an effective sentence of fourteen years' imprisonment. State v. Joe Jackson, No. W2014-00901-CCA-R3-CD, 2015 WL 5682855, at *1 (Tenn. Crim. App. Sept. 25, 2015). The facts giving rise to the convictions stem from an attempted shooting of the victim, Kent Payne, on November 6, 2012. The victim and another eyewitness to the shooting, Derekia Sanders, testified at trial that the Petitioner was driving in his sports utility vehicle (SUV) and began pursuing the victim while he was walking down the street. The Petitioner exited the SUV and fired a gun toward the victim. The victim and the

witness ducked to avoid the gunfire and later reported the offense to the police. Upon his appeal to this court challenging solely the sufficiency of the evidence, the Petitioner's convictions were affirmed and permission to appeal to the Tennessee Supreme Court was denied on February 18, 2016.

On March 21, 2017, the Petitioner filed a pro se petition for post-conviction relief, alleging actual innocence, that his fourteen-year sentence was excessive, and ineffective assistance of trial counsel in failing to adequately prepare for trial, failing to adequately inform the Petitioner, failing to prepare and investigate justifiable defenses for trial, failing to physically visit the crime scene, failing to file an ex parte motion for a crime scene reconstruction expert to rebut the State's case, and failing to challenge the State's failure to file its notice to seek enhanced punishment at sentencing.¹ The petition also generally alleged ineffective assistance of appellate counsel in raising only a single issue on appeal and ignoring all other issues of constitutional dimension raised in the motion for new trial. Finally, the Petitioner also alleged the trial court "misconstrued its authority" and failed to fulfill its role as a thirteenth juror by allowing the State to present false testimony. His pro se filing requested the court to appoint counsel and "make investigation." There were several attachments to the pro se petition including "Motion to Waive the Time Requirements For Filing"; "Final Decree of Divorce"; and computer generated printouts of case settings from the trial. While not entirely clear from the record, it also appears that the Petitioner filed pro se an amended petition for post-conviction relief with additional attachments on March 28, 2017.

On May 31, 2017, the post-conviction court appointed counsel to represent the Petitioner and entered a written scheduling order setting the evidentiary hearing within the next four months. Post-conviction counsel filed an amended petition for post-conviction relief on November 9, 2017, incorporating the original petition and, in addition, arguing ineffective assistance of trial counsel based on the failure to (1) pursue an alibi defense; (2) call alibi witnesses to testify; (3) effectively cross-examine witnesses; and (4) consult with the Petitioner concerning an offer to plead guilty. The State filed a written response on December 15, 2017, arguing, in pertinent part, that the petition should be dismissed for failure to support the grounds alleged with specific factual allegations in violation of Rule 28(F)(3) of the Tennessee Rules of the Supreme Court.

At some point before the next scheduled September 2018 court setting, the Petitioner filed a pro se motion for recusal of the post-conviction court. The initial recusal motion is not file stamped; however, the certification reflects an August 21, 2018 date. The

¹ This is the file stamp date on the pro se petition. The certification of service date is reflected as February 16, 2017. An order later entered by the post-conviction court excused the untimeliness of the filing because it was due to an error at the correctional facility.

initial pro se recusal motion alleged the post-conviction court (1) was “a material witness in the upcoming proceedings which disqualified him from presiding over any future proceedings” and (2) exhibited “an actual as well as perceive[d] bias.” As further grounds for the motion, the Petitioner alleged that while acting as the trial court in the original proceedings, the post-conviction court:

engaged in blatant advocacy on behalf of the [S]tate, and assumed facts not in the record with respect the State’s illicit and late filed notice of enhancement, during the (sic) and proceedings that occurred on February 28, 2014.

Attached to this motion appears to be a subpoena for the post-conviction judge, a motion to remove appointed post-conviction counsel, and an amended affidavit and memorandum of law in support of the same. The affidavit alleged that removal of counsel was necessary because the Petitioner intended to call him as a material witness to the post-conviction proceedings. Based on the affidavit, post-conviction counsel had sent the Petitioner a letter advising him that the post-conviction court “‘may pursue perjury charges’ against [the Petitioner’s family] and have them ‘prosecuted for perjury’ simply for them exercising their [First] Amendment rights to participate as witnesses in the instant post[-]conviction proceeding.” The Petitioner insisted that this was corroborative of the court’s bias, and the court’s January 7, 2013 statement that the court would have him arrested and indicted for practicing law without a license.

On August 28, 2018, the Petitioner filed a second pro se motion for recusal of the post-conviction court with supplemental authority, which also incorporated the previously mentioned recusal motion and memorandum of law. He additionally moved for removal of post-conviction counsel. Within this second recusal motion, the Petitioner alleged, in pertinent part, that recusal was necessary because the post-conviction court would be required to give “material testimony regarding its sua sponte pronouncement that Petitioner could not represent himself at trial.” The motion specifically stated as follows:

On January 7, 2013[,], your honor told Petitioner in an open court colloquy that “I will be arrested and indicted for practicing law without a license . . . do I make myself clear.”

The Petitioner continued to take issue with certain comments alleged to have been made by the post-conviction court during the original trial proceedings; namely, that recusal was necessary because the post-conviction judge, who presided over the trial, “refused to allow the State and the Petitioner to enter into and have candid plea negotiations.” On the same day, the Petitioner filed a pro se motion for production of

documents requesting transcripts of proceedings that were conducted in his case before the trial court on January 7, 2013, May 15, 2013, and July 19, 2013.

On September 5, 2018, the Petitioner filed a third, pro se amended petition for post-conviction relief, raising effectively the same issues addressed in the original pro se petition and the amended petition for post-conviction relief filed by counsel. On the same day, the Petitioner filed a pro se motion seeking a continuance because his motion to recuse and motion for the removal of counsel had not been ruled upon by the court. The Petitioner averred that he could not proceed with the evidentiary hearing because post-conviction counsel and the post-conviction court judge were “material witnesses.”

At a November 14, 2018 court setting, post-conviction counsel advised the court that the Petitioner sought to have him removed as counsel and stated, “[the Petitioner] now plans on calling me as a witness, although I can’t imagine how that would help his post-conviction case. It’s sort of put me in an odd position.” The Petitioner orally advised the court that he “hadn’t been getting no real footwork from” counsel. The Petitioner explained that he had asked for recusal of the court and counsel had not responded. Asked by the court the basis of the recusal motion, the Petitioner replied, “you have been biased a lot of times. And then you denied me a sixth amendment constitutional right of self-representation.” The Petitioner also expressed frustration over not having received certain unspecified documents. The court advised the Petitioner that discovery was complete in the matter, detailed the procedural history of the case, and stated as follows:

This case has been dragged out. It should have been brought to a conclusion a hundred and twenty days after this thing started in 2017. We’re now in November of 2018, a year and a half later.

And, if you choose to represent yourself, Mr. Jackson, you may certainly do so. But I am going to set this case for a hearing. And, on the hearing date, Mr. Jackson, you can represent yourself. If you want to hire another lawyer, you may do so.

But, if it’s not heard on that next date, Mr. Jackson, I’m going to dismiss it, because I will not continue to allow this case to fester

. . .

Your silly request to say, “Judge Coffee, I want you to recuse yourself,” is untimely, Mr. Jackson. It is untimely. I will, in fact, put that in writing at some point. But, when you believe there’s something that causes this Court to recuse itself, that should have been filed when you first were

aware of it, Mr. Jackson, and at the last moment, when I told you at the last setting that this is going to be heard, you say, “Well, Judge Coffee I need you to recuse yourself.”

I’m not going to let another judge – have you play games with another judge the way you’ve played with this Court and dragged this thing out, Mr. Jackson.

I’m going to give you a date for a hearing It will be heard on that next date, Mr. Jackson, or it will be dismissed, sir.

Later in the same colloquy, the Petitioner asked the court for more time to issue subpoenas, to which the post-conviction court stated, “And you have two months and eleven days to get that done.” The Petitioner replied, “I understand.” The court again recounted the history of the case and noted continuances on August 10, 2018, and September 28, 2018. In orally denying the Petitioner’s pro se motion for recusal, the court further advised that if post-conviction counsel deemed it appropriate to address recusal at the next hearing date, then the court would revisit the issue. However, the court reiterated that the case had lingered far too long in its court for the motion to have merit.

On January 17, 2019, the Petitioner filed yet another motion seeking to waive counsel and a notice of his intent to proceed pro se. The motion requested the post-conviction court grant an interlocutory appeal and further maintained that the court had “abused its discretion when it didn’t even inquire as to the basis of the conflict between” post-conviction counsel and the Petitioner. The transcript from the January 25, 2019 court setting reflects that the Petitioner, while not present due to error by the correction department, had filed several more pro se filings and issued requests for “thirty to forty” subpoenas from the clerk’s office, which the post-conviction court characterized, without review on the record, as “harassing.” The post-conviction court reset the matter from January 25 to March 21, 2019.

At the March 21, 2019 hearing, all parties were present and post-conviction counsel apprised the court of the Petitioner’s “unwavering desire” to represent himself. The court began to engage in a colloquy with the Petitioner; however, it declined to continue after determining that the Petitioner was being obstinate. The post-conviction court nevertheless removed post-conviction counsel from representation and advised the Petitioner that his case was going to be handled that day or be dismissed. When the Petitioner advised the court that his case was not ready to be heard, the post-conviction court took a two-and-a-half-hour break from the matter. Upon returning to the case, the post-conviction court allowed the Petitioner to explain that he was unable to proceed because his subpoenas had not been served and the court was a material witness. The court and the Petitioner engaged

in a lengthy colloquy, disputing what had transpired throughout the course of the case. The Petitioner ultimately requested a continuance, which was denied by the court. In orally dismissing the petition for post-conviction relief for failure to prosecute, the court stated, in pertinent part, as follows:

[The Petitioner] has been in court at least three times now for an evidentiary hearing for the petition for post-conviction relief. He continues to tell the Court that he is not ready, that he needs more time. And this is all dilatory. This is all designed to do one thing and one thing only, and that is to delay this petition for post-conviction relief. It took less time to try this case to a jury and get a jury verdict than it has taken to adjudicate the petition for post-conviction relief.

...

I've indulged [the Petitioner] and his silliness. I've indulged all of his interfering – purposeful interfering with the administration of justice in this court. He came in today and indicated that he wanted to rehear a recusal motion which I denied, and did not file an answer, did not file a written denial on it because, under Tennessee law, [the Petitioner] cannot file a pro se petition for recusal when he is represented by a lawyer So, the Court did not put in writing a response to that ridiculous motion that [the Petitioner] had filed asking the Court to recuse itself for absolutely no reason. [Post-conviction counsel] did not adopt that motion. Has never indicated that he thought it was a valid motion.

...

And the Court has had [the Petitioner] removed again, pursuant to Rule 43 of the Tennessee Rules of Criminal Procedure, because the Defendant has, in fact, persisted in interfering with the administration of justice in this courtroom, and he continues to not cooperate with anything that this Court tries to explain to [the Petitioner]

...

And this court will find that [the Petitioner] has voluntarily abandoned his petition for post-conviction relief by failing to present any proof And, I will not delay this matter any further, and I will, in fact, dismiss this petition for post-conviction relief. . . .

For the first time, later that day, the post-conviction court entered an order granting post-conviction counsel permission to withdraw, noting that the Petitioner was proceeding pro se. On May 6, 2019, the post-conviction court entered a sixteen-page, comprehensive order in support of dismissal of the petition, and a separate, twelve-page, extensive order in support of denial of the Petitioner's recusal motion. On April 25, 2019, the Petitioner filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

The Petitioner contends the post-conviction court erred in dismissing his petition for post-conviction relief and in denying his pro se motion to recuse. He specifically argues the post-conviction court "abused its discretion when he dismissed the petition for failure to prosecute, when the Court itself acknowledged the failure of the Shelby County Sheriff's department to serve even a single one of [the Petitioner's] lawfully filed subpoena's [sic] for the attendance of material witnesses." In response, the State contends that dismissal was proper, "where the Petitioner was not ready to proceed at the fourth setting of the evidentiary hearing and the post-conviction court found that he had purposefully delayed the resolution of his petition and abused the judicial process." Upon our review, we conclude that unrul'd upon, successive attempts by the Petitioner to proceed pro se do not constitute bad faith justifying dismissal of a petition for post-conviction relief. Because the record does not evince an abuse of judicial process by the Petitioner, we remand this matter for an evidentiary hearing.

Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. However, the post-conviction remedy may be denied to a petitioner who abuses the post-conviction process. Leslie v. State, 36 S.W.3d 34, 39 (Tenn. 2000) (reversing dismissal of petition for abuse of process for lack of evidence) (citing Cazes v. State, 980 S.W.2d 364, 365 (Tenn. 1998) (defendant forfeited his right to counsel and abused the judicial process based on successive filings for post-conviction relief)). Dismissal of a petition for post-conviction relief based upon an abuse of judicial process will be upheld on appeal so long as the post-conviction court "discerns that a litigant is abusing the post-conviction process by filing successive petitions and seeking repeated withdrawals, or is otherwise acting in bad faith[.]" Williams v. State, 831 S.W.2d 281, 283 (Tenn. 1992) (addressing the effect of a petitioner's voluntary withdrawal of a petition for post-conviction relief); see also Torian Dillard v. State, No. W2010-00306-CCA-R3-PC, 2011 WL 744740, at *5 (Tenn. Crim. App. Mar. 1, 2011) (affirming dismissal of petition for failure to prosecute when the petitioner, after repeated opportunities for an evidentiary hearing and fair warning from the court that he would be required to proceed on the next date, refused to go forward with his proof on that date); Charles Ritter v. State, No. E2003-

03016-CCA-R3-PC, 2004 WL 2309140, at *1 (Tenn. Crim. App. Oct.14, 2004) (reversing and remanding for evidentiary hearing to determine reason for delay in the case because the record was silent and the post-conviction court’s order failed to state the reasons for the dismissal).

The post-conviction court dismissed the petition primarily noting its frustration that the matter had been delayed beyond the four-month period prescribed by Tennessee Code Annotated section 40-30-109(a). The court reasoned, in relevant part, as follows:

the Petitioner had abused the judicial process, “thereby justifying the dismissal of the petition – with prejudice – for failure to prosecute.” After repeated opportunities for an evidentiary hearing and multiple fair warning from the Court that Petitioner would be required to proceed on March 21, 2019, the Petitioner refused to go forward with his proof on the fourth evidentiary hearing date.

However, our review of the record shows that the Petitioner began asserting his intent to proceed pro se in August 2018, eight months after the State filed its response to the first amended petition for post-conviction relief filed by counsel. See Lovin v. State, 286 S.W.3d 275, 285 (Tenn. 2009) (“While the constitutional right to self-representation does not apply to post-conviction proceedings, both the statutes authorizing the appointment of counsel in post-conviction proceedings and the rules implementing these statutes recognize that prisoners have the right of self-representation in post-conviction proceedings.”). There is no explanation for this eight-month delay of the case, and we cannot presume it was caused by the Petitioner. Almeer Nance v. State, No. E2005-02265-CCA-R3-PC, 2006 WL 1575110, at *3 (Tenn. Crim. App. June 9, 2006) (reversing dismissal of the petition because there was no evidence in the record that petitioner caused the delays in prosecution and the post-conviction court “did not make adequate findings of fact and conclusions of law to support its decision”).

The Petitioner reasserted his intent to proceed pro se in September 2018. Two months later, at the November 2018 setting, the post-conviction court orally advised the Petitioner that he could proceed pro se if he so chose; however, the post-conviction court did not engage in a colloquy to ensure the Petitioner was aware of the consequences of proceeding pro se or determine if he was capable of doing so. See Lovin, 286 S.W.3d at 287-88 (“To assure that the prisoner’s waiver of his or her right to appointed counsel is knowing and intelligent, the court must conduct an intensive hearing on the record to advise the prisoner of the consequences of self-representation and to determine that the prisoner knows and understands the consequences of his or her decision.”); Smith v. State, 987 S.W.2d 871 (Tenn. Crim. App. 1998). Moreover, the post-conviction court’s November 2018 comment did not definitively rule upon the Petitioner’s motion to

proceed pro se given the court's directive to post-conviction counsel to adopt the recusal motion if he deemed it appropriate. Without a ruling on the motion to proceed pro se, the Petitioner continued to be represented by post-conviction counsel until March 21, 2019, the day of the evidentiary hearing.

Indeed, it is well-settled that a petitioner cannot file pleadings pro se when represented by counsel. State v. Muse, 637 S.W.2d 468, 470 (Tenn. Crim. App. 1982). With this said, and the Petitioner's motion to proceed pro se notwithstanding, the Petitioner's pro se filings up until the March 21, 2019 evidentiary hearing were a nullity. Despite the Petitioner's best efforts, it was virtually impossible for him to have been prepared to proceed pro se and act as his own counsel at the evidentiary hearing the same day the post-conviction court entered its order permitting post-conviction counsel to withdraw. Under these circumstances, demanding that the Petitioner proceed with his case was unreasonable, and the post-conviction court abused its discretion in refusing to grant the Petitioner a continuance. State v. Goodwin, 909 S.W.2d 35, 44 (Tenn. Crim. App. 1995). We further conclude that the Petitioner's "unwavering" desire to represent himself was neither "a tactical ploy to disrupt and delay orderly judicial proceedings" nor meant to "unduly hinder the fair, efficient and orderly administration of justice." Lovin, 286 S.W.3d at 286 (internal citations/quotations omitted). Discerning no abuse of judicial process on this record, we are compelled to reverse the judgment of the post-conviction court dismissing the petition for failure to prosecute and remand this matter for an evidentiary hearing.

Although the Petitioner additionally argues the post-conviction court erred in refusing to grant his pro se recusal motion, as previously discussed, the Petitioner's pro se motions up until March 21, 2019, the day post-conviction counsel was permitted to withdraw, had no legal effect. We nevertheless conclude, based on the tone and tenor of the record in this case, that the post-conviction judge who heard this matter must be recused from further proceedings in this case. We take this course of action because at times throughout the proceedings, the post-conviction judge characterized the Petitioner as a "smartass" and his filings as "silly." See Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994) (noting that a judge should be recused whenever "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality"). Accordingly, from an objective view, the post-conviction judge must be recused from this case upon remand because the judicial system mandates that the judge must be perceived to be impartial. See e.g., Courtney Knowles v. State, No. W2018-00739-CCA-R3-PC, 2020 WL 2614672, at *10 (Tenn. Crim. App. May 22, 2020). Finally, because there was not a complete inquiry into the Petitioner's ability to proceed pro se, upon remand, the post-conviction court shall conduct a prompt hearing on the record to advise the Petitioner of the consequences of self-representation and determine whether he knows and understands the consequences of his

decision. If the post-conviction court is satisfied that the Petitioner has knowingly and voluntarily waived his statutory right to counsel, then the matter shall proceed in accord with the procedures of the Post-Conviction Act. Otherwise, the Petitioner is entitled to the appointment of counsel and his post-conviction case shall begin anew.

CONCLUSION

Discerning no abuse of the judicial process, the judgment of the post-conviction court dismissing the petition for post-conviction relief for failure to prosecute is reversed, and this case is remanded for an evidentiary hearing. Upon remand, the post-conviction judge who presided over the initial proceedings is recused, and another judge shall preside, to be appointed according to law.

CAMILLE R. McMULLEN, JUDGE