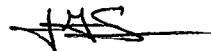


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JOHN GARRETT SMITH CERTIORARI



Filed
Washington State
Court of Appeals
Division Two

July 2, 2019

Rec'd
JES
7.8.19

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of:

JOHN GARRETT SMITH,
Petitioner.

No. 53445-2-II

ORDER TRANSFERRING
PETITION TO SUPREME
COURT

John Garrett Smith seeks relief from personal restraint imposed following his 2015 conviction for attempted second degree murder and second degree unlawful possession of a firearm. In this, his fifth petition,¹ he argues that (1) the trial judge was biased in favor of the complaining witness, (2) the complaining witness repeatedly perjured herself, and (3) the amended information was invalid because it was not ratified.

No.
This is a false statement.

Under RCW 10.73.140:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.

Because Smith has previously filed a personal restraint petition, this petition is successive under RCW 10.73.140. *In re Pers. Restraint of Bell*, 187 Wn.2d 558, 563, 387 P.3d 719 (2017). If a petition is successive under RCW 10.73.140 and not time-barred by RCW

¹ See Order Dismissing Petitions, *In re Pers. Restraint of Smith*, Nos. 51955-1-II, 52035-4-II, 52096-6-II and 52611-5-II (consolidated) (Nov. 14, 2018).

Exhibit 2

10.73.090(1), we must transfer the petition to the Supreme Court. *Id.*; see also *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 362, 256 P.3d 277 (2011).

RCW 10.73.090(1) requires that a personal restraint petition be filed within one year of the judgment becoming final. Smith's judgment and sentence became final on October 9, 2018, when the United States Supreme Court denied his petition for a writ of certiorari. RCW 10.73.090(3)(c). He filed his fifth petition on April 15, 2019, less than one year after his judgment and sentence became final. His petition is not time-barred and therefore must be transferred to the Supreme Court. Accordingly, it is hereby

ORDERED that Smith's petition is transferred to the Supreme Court for its consideration.

M. J.
Chief Judge

cc: John G. Smith
Clark County Prosecuting Attorney

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

JOHN GARRETT SMITH,
Petitioner.

No. 97380-6

Court of Appeals No. 53445-2-II

RULING DISMISSING PERSONAL
RESTRAINT PETITION

After a bench trial, a judge found John Smith guilty of attempted second degree murder and second degree assault. Division Two of the Court of Appeals reversed in part, but this court granted the State's petition for review and affirmed the judgment and sentence. *See State v. Smith*, 189 Wn.2d 655, 667, 405 P.3d 997 (2017), *cert. denied*, 136 S. Ct. 324 (2018). Mr. Smith timely filed multiple personal restraint petitions in the Court of Appeals. In this petition, Mr. Smith argues that the trial court was biased, that the complaining witness committed perjury, and that the amended information was invalid because it was based on perjured evidence. The acting chief judge transferred the petition to this court because it was timely filed but successive. RCW 10.73.140. Mr. Smith has also filed a motion for exercise of non-discretionary duty.¹ Presently before me is whether to dismiss the petition or to refer it to the court

¹ The motion for exercise of non-discretionary duty is denied because Mr. Smith does not support the allegations he makes in it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

for a decision on the merits or for an order remanding the petition to the superior court for a reference hearing. RAP 16.5(d); RAP 16.11(a), (b).

To obtain postconviction relief generally, Mr. Smith must show that he was actually and substantially prejudiced by constitutional error or that his trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). If Mr. Smith ultimately fails to present an arguable basis for collateral relief in law or in fact given the constraints of the personal restraint petition procedure, his collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

As indicated, Mr. Smith contends that the trial court was biased. Constitutional due process principles prohibit actual bias and the probability of unfairness. *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). A judge must recuse when the judge has a pecuniary interest in the case or where the party claiming bias has subjected the judge to abuse or criticism. *Id.* It is presumed that judges act with honesty and integrity, and Mr. Smith has the burden of overcoming that presumption. *Id.* He must do so with competent, admissible evidence. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory arguments are insufficient to merit either relief or a reference hearing. *Id.* Mr. Smith attaches documents in support of his allegations showing that the judge had previously ruled in cases involving the complaining witness. But that fact is insufficient to overcome the presumption of integrity and fails to demonstrate any actual bias.

• The appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also require recusal where the judge's impartiality may reasonably be questioned. *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). But Mr. Smith identifies no case holding that a judge's previous ruling in another case

IS the Judge's dismissal of 49 consecutive counts of acknowledged party not enough?
Is this is unconstitutional/misconduct/misconduct of bias - regardless of prejudicial manifestation of bias

involving a State's witness establishes bias or calls into question the judge's impartiality. Courts have found such evidence lacking when a judge had previously represented a defendant, *id.* at 329, or when a witness was an attorney who appeared frequently in the same court, *State v. Leon*, 133 Wn. App. 810, 812-13, 138 P.3d 159 (2006). Similarly here, no reasonable person would question the judge's impartiality based on the evidence Mr. Smith presents. What about 49 perjuries?

As to Mr. Smith's remaining claims, he fails to provide competent, admissible evidence in support. *Rice*, 118 Wn.2d at 886. Accordingly, his personal restraint petition is frivolous. *Khan*, 184 Wn.2d at 686-87.

The personal restraint petition is dismissed.

Court Records
+ Judges
own testimony

Walt M Buntz
DEPUTY COMMISSIONER

September 26, 2019

+ failed/refused to
address absence
of P.C. / J.D.