United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 18, 2020
Decided June 24, 2020

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-1417

PHILLIP L. HORRELL,
Petitioner-Appellant,

v.

DAVID GOMEZ,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 17-cv-2306

Sue E. Myerscough,
Judge.

ORDER

Phillip Horrell has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. He also has filed several letters to the clerk, a motion "to correct an inadvertent inaccuracy" in his application, a motion "to include additional exhibits," and motions to take "judicial notice" of various documents. We have considered these filings and reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Horrell's request for a certificate of appealability and his motion to proceed in forma pauperis are **DENIED**. All other pending motions are **DISMISSED** as **MOOT**.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

PHILLIP L. HORRELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 17-cv-2306**
	)	
MICHAEL D. DOWNEY,	)	
	)	
Respondent.	)	

ORDER

SUE E. MYERSCOUGH, U.S. District Judge:

Now before the Court is Petitioner Phillip L. Horrell's Motion to Reopen his case pursuant to Fed. R. Civ. P. 60(b)(6) (Doc. 41) and his Motion Requesting Transfer of his Motion to a Different District Court Judge (Doc. 40). For the reasons explained below, Petitioner's Motion to Reopen (Doc. 41) is DENIED. Petitioner's Motion Requesting Transfer of his Motion to a Different District Court Judge (Doc. 40) is DISMISSED AS MOOT in light of the transfer of his case from Judge Colin S. Bruce to the undersigned Judge.

I. BACKGROUND

Petitioner is currently in the custody of the state of Illinois at the Stateville Correctional Center in Crest Hill, Illinois. In 2013, Petitioner pled guilty but mentally ill to one count of felony murder and one count of attempted murder in the Circuit Court of Kankakee County, Illinois, Case No. 2012-CF-541. He was sentenced to life in prison for murder plus thirty years' imprisonment for attempted murder. The trial court denied Petitioner's Motion to Reconsider Sentence. Petitioner appealed. On November 1, 2015, the Illinois Appellate Court vacated all prior post-sentencing trial court proceedings and remanded the case to the trial court because Petitioner's trial counsel failed to comply with Illinois Supreme Court Rule 604(d) when presenting Petitioner's post-sentencing motions. Petitioner filed a Motion to Withdraw Guilty Plea, which appears to have been pending in the Circuit Court of Kankakee County, Illinois since 2016.

On December 8, 2017, Petitioner filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), and an Amended Petition (Doc. 14) on March 7, 2018. The case was assigned to United States District Judge Colin S. Bruce. On

October 16, 2018, Judge Bruce dismissed Petitioner's Petition and Amended Petition without prejudice. (Doc. 27). Judge Bruce held that the Petitions must be dismissed under Younger abstention principles and because Petitioner has not yet exhausted his state court remedies. Judge Bruce declined to grant a certificate of appealability. Petitioner appealed, seeking a certificate of appealability from the Seventh Circuit.

In August 2018, prior to Judge Bruce's order dismissing Petitioner's case, it became public that Judge Bruce had engaged in ex parte communications with members of the United States Attorney's Office in Urbana regarding certain criminal matters. Prior to Judge Bruce's appointment to the judiciary, he had worked in the U.S. Attorney's Office in Urbana, Illinois, in the Central District of Illinois for twenty-four years, beginning in 1989. Upon learning of the emails, then-Chief Judge Shadid temporarily removed Judge Bruce from all cases involving the United States Attorney's Office in August 2018.[1] See United States v. Atwood, 941 F.3d 883, 884 (7th Cir. 2019). Petitioner's case did not concern

[1] Petitioner's Motion incorrectly contends that Judge Bruce was "taken off the bench" shortly after the October 16, 2018 decision in Petitioner case. Mot. at 1 (Doc. 41).

the United States Attorney's Office, and, therefore, Judge Bruce was not removed from his case.

After an investigation by a Special Committee, the Judicial Council of the Seventh Circuit admonished Judge Bruce for his practice of ex parte communications and found that his communications violated Canon 3(a)(4) of the Code of Conduct for United States Judges. In re Complaints Against Dist. Judge Colin S. Bruce, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019). Judge Bruce was also ordered to remain unassigned to matters involving the U.S. Attorney's Office in the Central District of Illinois until September 1, 2019. Id. However, the Judicial Council "identified no evidence suggesting that Judge Bruce's ex parte contact or relationship with the U.S. Attorney's Office in the Central District of Illinois impacted his decision making in any case." Id.

Petitioner claims he did not learn of Judge Bruce's ex parte communications until after his appeal was pending. Petitioner filed a motion to supplement his appeal on February 25, 2019, arguing that Judge Bruce should have recused himself under the federal recusal statute, 28 U.S.C. § 455(a). Horrell v. Downey, Case No.

18-3399 (7th Cir.), Mot. to Supp., d/e 24. Petitioner argued that one of the attorneys that represented him in his state proceedings, Lawrence Beaumont, previously worked with Judge Bruce in the United States Attorney's Office. Petitioner's § 2254 Petition included claims of ineffective assistance counsel against Mr. Beaumont. Accordingly, Petitioner argued that Judge Bruce was required to recuse himself because he had a possible temptation to "help" a former colleague. The Seventh Circuit denied Petitioner's request for a certificate of appealability and denied his pending motions. Horrell v. Downey, Case No. 18-3399 (7th Cir. Mar. 11, 2019); Mandate (Doc. 39). Petitioner filed a Petition for Writ of Certiorari with the Supreme Court, which was denied on June 17, 2019.

On November 5, 2019, Petitioner filed the instant motion (Doc. 41) to reopen his proceedings pursuant to Fed. R. Civ. P. 60(b)(6). Like his supplemental motion to the Seventh Circuit, Petitioner argues that Judge Bruce should have recused himself pursuant to the federal recusal statute and, accordingly, he is entitled to a new decision on his Petition. The Court finds that Petitioner has not shown extraordinary circumstances warranting reopening his

proceedings under Fed. R. Civ. P. 60(b)(6) and has not timely filed his motion.

II. DISCUSSION

Petitioner brings his motion pursuant to Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6) allows relief for judgment for any other reason—other than the reasons listed in Rule 60(b)(1) to (5)—that justifies relief. "A motion under Rule 60(b)(6) is addressed [in] the district court's discretion, and . . . requires the movant to establish that 'extraordinary circumstances' justify upsetting a final decision." Choice Hotels Int'l, Inc. v. Grover, 792 F.3d 753, 754 (7th Cir. 2015) (internal citations omitted). The motion must also be made within a reasonable time. Gonzalez v. Crosby, 545 U.S. 524, 535, 125 S. Ct. 2641, 2649 (2005). Here, the Court finds that Petitioner has not meet either requirement.

A. Petitioner Has Not Shown Extraordinary Circumstances Warrant Relief.

Petitioner argues that Judge Bruce was required to recuse himself pursuant to the federal recusal statute, 28 U.S.C. § 455(a), and, therefore, he is entitled to relief under Rule 60(b)(6). However, Petitioner has not established extraordinary circumstances that

warrant upsetting the decision because he has not shown a violation of § 455, and, even if he had, any violation would have been harmless.

Section 455(a) provides, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Id. Here, however, the Court does not find that a § 455(a) violation has occurred. Upon discovery of Judge Bruce's ex parte emails, then-Chief Judge Shadid temporarily removed Judge Bruce from cases that concerned the U.S. Attorney's Office. Petitioner's case did not involve the U.S. Attorney's Office, so removal was not deemed necessary, even as a precaution. Petitioner still claims that recusal was necessary because Judge Bruce and Petitioner's former defense attorney, Mr. Beaumont, both worked at the U.S. Attorney's Office in the 1990s, and Petitioner's Petition included claims of ineffective assistance of counsel by Mr. Beaumont. However, Petitioner has provided no evidence that Judge Bruce was biased towards Mr. Beaumont or against Petitioner.

Petitioner claims that the ex parte communications of Judge Bruce provide the requisite evidence of the appearance of bias. As

Petitioner notes, the Seventh Circuit has already held that Judge Bruce's ex parte communications do show an appearance of bias towards the United States Attorney's Office. United States v. Atwood, 941 F.3d 883, 884 (7th Cir. 2019); see also, United States v. Williams, No. 18-3318, 2020 WL 632712, at *5 (7th Cir. Feb. 11, 2020). But, there is no rational basis to extend this finding of an appearance of bias toward anyone who ever worked at the U.S. Attorney's Office with Judge Bruce or any other conceivable friends or acquaintances of Judge Bruce. Judges are part of the legal community, and it comes as no shock that judges may have had a past working relationship with attorneys that come before them or who are mentioned in claims of ineffective assistance of counsel. However, there is a presumption that judges can rise above any potential biases, including friendships. See United States v. Williams, No. 18-3318, 2020 WL 632712, at *3 (7th Cir. Feb. 11, 2020) ("Courts presume that judges are honest, upright individuals who rise above biasing influences") (citing Franklin v. McCaughtry, 398 F.3d 955, 959 (7th Cir. 2005)); United States v. Murphy, 768 F.2d 1518, 1537–38 (7th Cir. 1985) (noting individual friendships

between lawyers and judges is not only allowed, but desirable).

Here, Petitioner has failed to even show evidence of a friendship, let alone any evidence that Judge Bruce was unable to overcome a potential bias that Judge Bruce and Mr. Beaumont's shared tenure at the United States Attorney's Office in the 1990s may have created. Accordingly, the Court finds that Petitioner has not shown that there was an appearance of bias in his case regardless of Judge Bruce's ex parte communications with certain members of the United States Attorney's Office. Therefore, he has not shown a violation of § 455(a).

Moreover, even if Petitioner had shown a § 455(a) violation, the Court finds that the error in failing to recuse was harmless. See Williamson v. Indiana Univ., 345 F.3d 459, 464 (7th Cir. 2003) (holding that where a litigant shows a violation of § 455, relief under "Rule 60(b) is not automatically justified if [the] error was harmless"). In Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194 (1988), the Supreme Court set forth the factors to consider in determining whether Rule 60(b)(6) relief is available for a violation of § 455(a): "[I]t is appropriate to consider the risk of injustice to the parties in the particular case, the risk

that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." Id. at 864.

The Seventh Circuit addressed Judge Bruce's ex parte communications and applied the Liljeberg factors in two recent cases. First, in United States v. Atwood, 941 F.3d 883 (7th Cir. 2019), the defendant had pled guilty and Judge Bruce had presided over the defendant's sentencing hearing. The criminal case was prosecuted by the U.S. Attorney's Office. The Seventh Circuit found that Judge Bruce's failure to recuse himself under the federal recusal statute in light of the ex parte communications was not harmless error and remanded for resentencing. The Seventh Circuit evaluated the three factors outlined in Liljeberg and found that all three factors weighed in favor of resentencing. Specifically, the Seventh Circuit noted the discretion afforded a judge during sentencing, the potential to "'prevent a substantive injustice in some future case' . . ., by encouraging judges to exercise caution in their communications," and that "[a]llowing Atwood's sentence to stand would undermine the public's confidence in the fairness of this sentence and in the impartiality of the judiciary." Id. at 886.

Accordingly, the Seventh Circuit remanded for resentencing by a different judge. Id.

Next, in United States v. Williams, No. 18-3318, 2020 WL 632712 (7th Cir. Feb. 11, 2020), the Seventh Circuit again addressed Judge Bruce's ex parte communications in a case where he had presided over the defendant's trial, but not sentencing hearing. However, the Seventh Circuit found the facts of Williams distinguishable from Atwood because Judge Bruce had only presided over the jury trial and not the sentencing hearing. "This distinction matters because judges generally have more discretion over sentencing than the outcome of a jury trial." Id. at *6. Turning to the Liljeberg factors, the Seventh Circuit found all factors pointed against granting a new trial. With regard to the second factor, the risk that the denial of the requested relief will produce injustice in future cases, the Seventh Circuit noted that the Special Committee's public findings and the Judicial Council's Order had already minimized against the risk of future violations. Id. at *7.

As in the Williams case, the Court finds that the Liljeberg factors suggest harmless error—to the extent there was any error.

Under the first factor, there is little risk of injustice to Petitioner in this particular case. Judge Bruce's decision in this matter was based on an application of legal precedent and did not turn on any discretionary fact-finding.[2] See Atwood, 941 F.3d at 885 (noting, by contrast, the "open-endedness of the sentencing factors [which] leaves ample room for the court's discretion"); Williams, 2020 WL 632712 at *6 (finding that there was little risk of injustice to the defendant where there was no evidence of prejudice in the pre-trial or trial motions ruled upon by Judge Bruce). Petitioner has shown no evidence of prejudice in Judge Bruce's ruling, and any error in his rulings could have been addressed on appeal. Notably, Petitioner did appeal, and the Seventh Circuit affirmed Judge Bruce's decision and judgment. Unlike a new trial, there is less risk of injustice to the government, but the government would still be

[2] The Court notes that Petitioner's Motion states: "I was deemed guilty by Judge Bruce" and "Judge Bruce ruled that the "crimes I committed" and the "gravity" of them just renders me guilty without need for merits-based review." Mot. at 9, 18 (Doc. 41). However, Judge Bruce's order dismissing the case without prejudice made no determinations on the merits of his claim. This ruling was because he had not exhausted his claims at the state level and had not made a showing of extraordinary circumstances warranting a federal court hearing unexhausted claims. Judge Bruce's mention of the "gravity" of Petitioner's convictions was to provide context for the delay by the state court. See J. Bruce Order at 7 (Doc. 27). Petitioner is still entitled to bring his claims in the future after his state court proceedings have concluded.

required to spend at least some valuable time and resources briefing this case should the requested relief be granted. Therefore, the first Liljeberg factors weighs against Petitioner.

Next, the second Liljeberg factor concerns the risk of injuries to litigants in future cases. In Atwood, the Seventh Circuit was addressing the impact of Judge Bruce's emails on a case that did concern the United States Attorney's Office—a criminal case in which Judge Bruce presided over the sentencing hearing. Atwood, 941 F.3d at 884. The Seventh Circuit found that the second Liljeberg factor favored the defendant because enforcing § 455(a) "encouraged judges to exercise caution in their communications." Id. at 885. However, evaluating the same factor in Williams, the Seventh Circuit found that the factor counselled against granting relief because the Special Committee's public report and Judicial Council's Order, as well as Judge Bruce's new policies prohibiting any email communications with counsel, mitigated against any future risk of injustice to other parties. Williams, 2020 WL 632712 at *6. Here, Petitioner's claim is still loosely related to Judge Bruce's email communications, and, therefore, could conceivably still have some encouraging effect for judges to exercise caution in

their communications as the Seventh Circuit found in Atwood. However, in light of Williams, this Court, too, finds that the risks have been mitigated and that this factor leans toward denying Petitioner's requested relief.

Finally, the Court finds there is little risk of harm to the public's confidence in the impartiality of the judiciary by upholding this decision. As the Court said above, any errors that Judge Bruce committed in analyzing Petitioner's claims could have been appealed to the Seventh Circuit. Since the Seventh Circuit already affirmed Judge Bruce's decision, "the act of vacating the district court's judgment would be counterproductive, inefficient, and would serve only to weaken public confidence by undermining the finality of judgments." Williamson v. Indiana Univ., 345 F.3d 459, 465 (7th Cir. 2003); Williams, 2020 WL 632712 at *7 (finding that because there was no evidence of actual bias, "overturning a jury verdict based purely on the appearance of bias creates a risk that the public will lose confidence in the judicial process"). Accordingly, the third Liljeberg factor does not favor relief.

Overall, after evaluating the three Liljeberg factors, the Court finds that, even if Petitioner had shown a violation of § 455(a), he

has not shown extraordinary circumstances warranted vacating the judgment under Rule 60(b)(6).

B. Petitioner's Motion Was Not Made Within a Reasonable Time.

Even if Petitioner could have shown extraordinary circumstances warranting relief, the unreasonable delay in filing his Motion also constitutes grounds to deny his Motion. "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties." Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986). "In the typical 'extraordinary' case, . . .there just is no way the party seeking to set aside the judgment could have discovered the ground for doing so within a year of its entry." Lowe v. McGraw-Hill Companies, Inc., 361 F.3d 335, 342 (7th Cir. 2004) (internal citations omitted).

Here, the evidence of Judge Bruce's ex parte communications was made public in August 2018. As Judge Bruce did not enter the judgment in this case until October 16, 2018, Petitioner could have

filed a timely motion to recuse prior to the entry of judgment. In Petitioner's Motion, he admits to learning that Judge Bruce was "taken off the bench" by at least October 2018. Mot. at 2 (Doc. 41). Accordingly, Petitioner was on notice of his potential claim regarding Judge Bruce's impartiality at least by October 2018.

Petitioner claims that he "did not learn why [Judge Bruce was removed from cases] until" United States v. Atwood, 941 F.3d 883, 884 (7th Cir. 2019), was decided on October 24, 2019. Mot. at 2 (Doc. 41). However, this statement is not accurate, as Petitioner was certainly aware of the basis for his Rule 60(b)(6) Motion by the time Petitioner sought to supplement the record on appeal on February 25, 2019. See Horrell v. Downey, Case No. 18-3399 (7th Cir.), Mot. to Suppl. (seeking to add claim that Judge Bruce should have recused himself under 28 U.S.C. § 455(a) for the same reasons presented in this Motion). Even if Petitioner sought to delay filing the instant Rule 60(b)(6) Motion until after the Supreme Court's denial of his petition for writ of certiorari, Petitioner's four-month delay between the Supreme Court's denial of his petition for writ of certiorari on June 17, 2019 and filing this Motion on November 5, 2019 is not reasonable. Accordingly, the Court finds that

Petitioner's motion was not filed within a reasonable time and would deny the motion on this basis as well.

III. CONCLUSION

For the reasons stated above, Petitioner Phillip L. Horrell's Motion to Reopen Pursuant to Rule 60(b)(6) (Doc. 41) is DENIED. Petitioner's Motion Requesting Transfer of his Motion to a Different District Court Judge (Doc. 40) is DISMISSED AS MOOT in light of the transfer of his case the undersigned judge.

SIGNED: February 26, 2020

/s/ Sue E. Myerscough
SUE E. MYERSCOUGH
UNITED STATES DISTRICT JUDGE