Nos. 20-1190/1210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 16, 2020
DEBORAH S. HUNT, Clerk

DARYL DUDE NELSON,

Petitioner-Appellant,

v.

MIKE BROWN, Acting Warden,

Respondent-Appellee.

ORDER

Before: DONALD, Circuit Judge.

In Case Number 20-1190, Daryl Dude Nelson, a Michigan prisoner proceeding pro se, appeals the district court's order denying his Federal Rule of Civil Procedure 60(b) motion for relief from judgment, which he filed after the district court denied his habeas petition, filed pursuant to 28 U.S.C. § 2254. In Case Number 20-1210, Nelson appeals the district court's order denying his motion to recuse the district court judge. Nelson seeks a certificate of appealability ("COA") in both cases, and he moves for leave to proceed in forma pauperis ("IFP"). He has also filed a motion to remedy a jurisdictional defect.

A jury convicted Nelson of second-degree murder, in violation of Michigan Compiled Laws § 750.317, and reckless driving causing death, in violation of Michigan Compiled Laws § 257.626(4). *See People v. Nelson*, No. 323685, 2016 WL 155783, at *1 (Mich. Ct. App. Jan. 12, 2016) (per curiam). The trial court sentenced him as a third habitual offender to twenty-five to fifty years of imprisonment on the second-degree murder charge and twelve to twenty-four years of imprisonment on the reckless-driving charge, to run concurrently. *See id.* The Michigan Court of Appeals affirmed Nelson's convictions and sentences, *id.* at *11, and the Michigan Supreme Court denied leave to appeal, *People v. Nelson*, 877 N.W.2d 885 (Mich. 2016) (mem.).

APPENDIX A

In June 2016, Nelson filed a § 2254 habeas petition, raising three grounds for relief: (1) improper charging documents deprived the trial court of subject-matter jurisdiction; (2) he was deprived of his Sixth Amendment right to counsel; and (3) trial counsel performed ineffectively. On October 31, 2016, the district court denied the petition, finding that Nelson's first ground for relief was not cognizable in a federal habeas proceeding and that his second and third grounds were meritless. This court denied Nelson's application for a COA. *Nelson v. Jackson*, No. 16-2623, slip op. at 7 (6th Cir. July 17, 2017) (order).

On September 12, 2019, Nelson filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, arguing that the district court judge committed fraud by failing to address his allegation that a signature on the criminal complaint was forged. Nelson also argued that the district court failed to address "an audio recording of a phone conversation where [his attorney] was lying to [him] about the motions that he was retained to file[]" and failed to include a letter as part of the record.

Nelson also filed a motion to disqualify the district court judge, arguing that she was biased and partial because she refused to recognize that he had raised a meritorious argument in his habeas petition. He contended that the judge's conduct amounted to a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), and a conspiracy to overthrow or destroy the United States government, in violation of 18 U.S.C. § 2384.

The district court denied Nelson's Rule 60(b) motion, finding that he failed to allege that an officer of the federal habeas court committed fraud. It noted that, to the extent that Nelson alleged that the assistant prosecutor forged a signature on the charging documents, he was alleging a fraud committed on the state court. It further found that, to the extent that Nelson alleged that it failed to address his claim about the forged complaint, his motion was untimely because it was not filed within one year of the challenged judgment. The district court declined to issue a COA and denied leave to proceed IFP on appeal. Nelson filed a notice of appeal, and that appeal is docketed as Case Number 20-1190. The district court also denied Nelson's motion to disqualify, finding that its prior adverse rulings were insufficient to show judicial bias. Nelson filed a notice of appeal

challenging the denial of his motion to disqualify, and that appeal has been docketed as Case Number 20-1210. Nelson filed two COA applications, which the district court transferred to this court.

In the COA application that Nelson filed in this court in Case Number 20-1190, Nelson reiterates his argument that the district court committed fraud when it failed to grant relief on his claim that the criminal complaint filed in state court contained a forged signature. He maintains that his convictions "are illegal and wholly void upon their faces" and that his "conviction, judgment and imprisonment is wholly unjust." Nelson also argues that the district court has inherent power to grant relief for fraud upon the court that is not discovered until well after the earlier judgment issued. Nelson's motion to remedy a jurisdictional defect simply argues the merits of his claim that the criminal complaint was invalid because it was not signed under oath.

In the COA application that Nelson filed in Case Number 20-1210, Nelson argues that the district court judge should have recused herself because it was apparent from the face of his habeas petition and exhibits that the Michigan Court of Appeals "made [a] mockery of the Federal Constitution" when it found that the criminal complaint complied with the requirements of Michigan law. He contends that the judge "willfully ignored" this claim when ruling on his habeas petition.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). If the petition was denied on procedural grounds, the petitioner must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Rule 60(b)(1) authorizes relief for "mistake, inadvertence, surprise, or excusable neglect," and Rule 60(b)(3) authorizes relief from a judgment that was based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(1), (3). However, a motion filed under either of these subsections must be filed within one year of the entry of the judgment or order being challenged. Fed. R. Civ. P. 60(c)(1). The district court denied Nelson's habeas petition on October 31, 2016, and Nelson did not file his Rule 60(b) motion until September 12, 2019. Reasonable jurists therefore could not debate the district court's conclusion that, to the extent that Nelson sought relief under Rule 60(b)(1) and 60(b)(3), his motion was untimely.

Nelson also cited Rule 60(b)(4), which authorizes relief if "the judgment is void." Fed. R. Civ. P. 60(b)(4). But Nelson alleged that the state court's judgment was void, not the district court's judgment. Nelson also contends that, in addition to the authority granted by Rule 60(b)(1), the district court has inherent authority to set forth a judgment based on fraud. Indeed, "[t]he Supreme Court has recognized a court's inherent power to grant relief, for 'after-discovered fraud,' from an earlier judgment 'regardless of the term of [its] entry.'" *Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (second alteration in original) (quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238, 244 (1944)). But the fraud that Nelson alleges was not recently discovered—Nelson argued in his Rule 60(b) motion that he raised his claim of fraud in his *original habeas petition*. Finally, to the extent that Nelson could have pursued his claims under Rule 60(b)(6), reasonable jurists would agree that his motion was not filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1). The district court's alleged failure to address a specific argument would have been apparent as soon as the district court entered its order, and Nelson provides no persuasive reason justifying the almost three-year delay in filing his Rule 60(b) motion.

Reasonable jurists also could not debate the district court's conclusion that Nelson's motion to recuse was meritless, because his arguments were based solely upon the district court's decision to deny habeas relief. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias

or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Nelson cited nothing outside of his current habeas proceeding to support his allegation of bias, and he did not set forth any facts to indicate that the district court judge "display[ed] a deep-seated favoritism or antagonism." *Id.*

Accordingly, this court **DENIES** Nelson's COA applications and his motion to remedy a jurisdictional defect and **DENIES** as moot his motions for leave to proceed IFP.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Nos. 20-1190/1210

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 30, 2020
DEBORAH S. HUNT, Clerk

DARYL DUDE NELSON,

Petitioner-Appellant,

v.

MIKE BROWN, ACTING WARDEN,

Respondent-Appellee.

ORDER

Before: STRANCH, THAPAR, and READLER, Circuit Judges.

Daryl Dude Nelson petitions for rehearing en banc of this court's order entered on June 16, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C (2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARYL DUDE NELSON,

Petitioner,

v.

Civil No. 2:16-CV-12260
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

SHANE JACKSON,

Respondent,

_____/

OPINION AND ORDER DENYING THE MOTION TO DISQUALIFY

Daryl Dude Nelson, ("Petitioner"), filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for second-degree murder, reckless driving causing death, and being a third felony habitual offender. The Court denied the petition on the merits. *Nelson v. Jackson*, No. 2:16-CV-12260, 2016 WL 6441287 (E.D. Mich. Oct. 31, 2016); *appeal dism.* No. 16-2623, 2017 WL 5624278 (6th Cir. July 17, 2017), *cert. denied,* 138 S. Ct. 478 (2017).

Petitioner filed a Rule 60(b) motion for relief from judgment and a motion to supplement the motion, which remain pending before the Court. (ECF Nos. 27 and 28).

Petitioner has now filed a motion to disqualify this Court from adjudicating his pending motions. For the reasons that follow, the motion is DENIED.

APPENDIX B (1)

28 U.S.C. § 455 (a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." Under 28 U.S.C. § 455(a), a judge must recuse himself or herself "'if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality.'" *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990)(quoting *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990)). The Supreme Court has held that under § 455(a), opinions formed by judges on the basis of facts introduced or events occurring "in the course of current proceedings, or of prior proceedings, do not constitute bias or partiality" unless they display "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). To state a claim that a judge is biased, a defendant must show either actual bias or the appearance of bias creating a conclusive presumption of actual bias. *United States v. Lowe*, 106 F. 3d 1498, 1504 (6th Cir. 1997). Adverse rulings are not themselves sufficient to establish bias or prejudice which will disqualify a judge. *See Mason v. Burton,* 720 F. App'x. 241, 242–43 (6th Cir. 2017); *Hence v. Smith,* 49 F. Supp. 2d 547, 549 (E.D. Mich. 1999). A habeas petitioner's "unsupported accusations" and "unfounded surmise" of bias on the part of a federal judge presiding over his or her habeas petition are

insufficient to establish grounds for disqualification of that judge from presiding over the case. *See Bates v. Grant,* 98 F. App'x. 11, 15 (1st Cir. 2004).

The only evidence of judicial bias that petitioner points to is the fact that this Court previously ruled against petitioner in denying him habeas relief. The mere fact that this Court ruled adversely against petitioner in his habeas relief is insufficient to establish judicial bias or to support judicial disqualification.

The Sixth Circuit has repeatedly held that a habeas or post-conviction judge's involvement in a habeas petitioner or post-conviction movant's prior case does not show bias or require the judge to disqualify himself or herself. *See United States v. Campbell,* 59 F. App'x. 50, 52 (6th Cir. 2003)(trial judge not required to recuse himself from hearing movant's § 2255 motion to vacate sentence, where movant's dissatisfaction with judge's rulings in his criminal case and during post-conviction proceedings did not establish bias that would warrant recusal); *Kemp v. United States,* 52 F. App'x. 731, 733-34 (6th Cir. 2002)(same); *Browning v. Foltz,* 837 F. 2d 276, 279-80 (6th Cir. 1988)(judge not required to recuse himself from hearing petitioner's second habeas petition merely because he indicated in order denying petitioner's first petition for habeas corpus that petitioner's release due to technicalities would be illogical and unjust); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985); *vacated on other grds*, 10 F.3d 338 (6th Cir. 1993)(district judge, who presided over denaturalization proceedings involving

detainee was not required to recuse himself under 28 U.S.C.A. § 455(a) from hearing petition for writ of habeas corpus under 28 U.S.C.A. § 2241 following certification of detainee as extraditable to Israel under 18 U.S.C.A. § 3184, in that there was no evidence of actual bias on the part of district judge); *See also Kersh v. Macomb St. Clair Employment Training Agency*, 55 F. App'x. 723, 725 (6th Cir. 2003)(district court's refusal to recuse itself from hearing plaintiff's motion for relief from judgment was not abuse of discretion; court's mere participation in earlier proceedings would not have convinced reasonable person that court was biased against movant).

This Court denies petitioner's motion to disqualify itself from presiding over petitioner's habeas application or his pending motions. The Court has not formed an opinion as to the validity of petitioner's motion for relief from judgment or the supplemental motion. Under the circumstances, a reasonably objective person would not question this Court's objectivity.

IT IS HEREBY ORDERED that the motion to disqualify (ECF No. 29) is **DENIED.**

s/Denise Page Hood
CHIEF UNITED STATES DISTRICT JUDGE

Dated: February 14, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARYL DUDE NELSON,

Petitioner,

v.

SHANE JACKSON,

Respondent,

_____/

Civil No. 2:16-CV-12260
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE MOTION FOR RELIEF FROM JUDGMENT (Dkt. # 27), THE MOTION TO SUPPLEMENT (Dkt. # 28), DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND DENYING LEAVE TO APPEAL *IN FORMA PAUPERIS*

Daryl Dude Nelson, ("Petitioner"), filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for second-degree murder, reckless driving causing death, and being a third felony habitual offender. The Court denied the petition on the merits. *Nelson v. Jackson*, No. 2:16-CV-12260, 2016 WL 6441287 (E.D. Mich. Oct. 31, 2016); *appeal dism.* No. 16-2623, 2017 WL 5624278 (6th Cir. July 17, 2017), *cert. denied,* 138 S. Ct. 478 (2017).

Petitioner has now filed a Rule 60(b) motion for relief from judgment and a motion to supplement the motion. For the reasons that follow, the motions are DENIED.

APPENDIX B (2)

Petitioner claims that in his motion that he is entitled to relief from judgment because the criminal complaint that was filed against him in the 36th District Court was defective because the assistant prosecutor forged the signature of the complaining witness on the complaint. Petitioner further alleges that this Court failed to address his claim that the complaint was forged. Petitioner makes similar arguments in his motion to supplement.

Under Fed. R. Civ. P. 60(b), a motion for relief from judgment can be granted for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or,
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> The elements of fraud upon the court consists of conduct:
>
> 1. on the part of an officer of the court;
> 2. that is directed to the "judicial machinery" itself;
> 3. that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;

4. that is a positive averment or is concealment when one is under a duty to disclose; and,
5. that deceives the court.

Demjanjuk v. Petrovsky, 10 F. 3d 338, 348 (6th Cir. 1993).

Petitioner's "fraud on the court" claim is without merit, because he failed to show that any alleged fraud was committed by an officer of *this Court.* (emphasis supplied). In order for a claim of fraud on the court to succeed, so as to permit relief from a state conviction pursuant to Fed.R. Civ. P. 60, "the fraud must have been committed by an officer of the federal habeas trial or appellate courts." *Buell v. Anderson,* 48 F. App'x. 491, 499 (6th Cir. 2002)(citing *Workman v. Bell*, 227 F. 3d 331, 336, 341 (6th Cir. 2000)(*en banc*)). The assistant prosecutor was not acting as an officer of the federal habeas court when, while acting in his capacity, he signed the various documents initiating the prosecution against petitioner, thus, the "fraud upon the court" exception does not apply to permit petitioner to relief from judgment. *Id.*

To the extent that petitioner claims that this Court erred in failing to address his claim about the forged complaint, his Rule 60(b) motion is untimely.

A Rule 60(b)(1) motion is normally required to be filed within one year of the challenged judgment. Fed. R. Civ. P. 60(c)(1). However, a Rule "60(b)(1) motion based on legal error must be brought within the normal time for taking an

appeal." *Yarbrough v. Warden, Lebanon Corr. Inst.*, No. 16-4083, 2017 WL 3597427, at * 2 (6th Cir. May 25, 2017), *cert. denied sub nom. Yarbrough v. Schweitzer*, 138 S. Ct. 333 (2017)(quoting *Pierce v. United Mine Workers of Am. Welfare & Ret. Fund*, 770 F.2d 449, 451 (6th Cir. 1985)). The time to appeal a civil action is thirty days after entry of the judgment. Fed. R. App. P. 4(a)(1)(A). Petitioner's current Rule 60(b) motion was filed way beyond the thirty day limit for filing an appeal. The Court denies the Rule 60(b) motion.

When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

In habeas cases involving a district court's denial of a 60(b) motion for relief from judgment on procedural grounds without reaching the merits of any constitutional claims, a petitioner should be granted a certificate of appealability only if he makes both a substantial showing that he had a valid claim of the denial of a constitutional right, and a substantial showing that the procedural ruling by the district court is wrong. *See United States v. Hardin,* 481 F. 3d 924, 926, n. 1 (6th Cir. 2007).

Petitioner is not entitled to a certificate of appealability from the denial of his motion for relief from judgment and the related motion to supplement, because he has failed to make a substantial showing of the denial of a constitutional right or that this Court's procedural ruling was incorrect. The Court further concludes that petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. See Fed.R.App. P. 24(a).

IT IS ORDERED THAT:

(1) The motion for relief from judgment and the motion to supplement are DENIED.
(2) A certificate of appealability is DENIED.

(3) Petitioner is DENIED Leave to Appeal *In Forma Pauperis.*

Dated: February 14, 2020

s/Denise Page Hood
Chief Judge, United States District Court