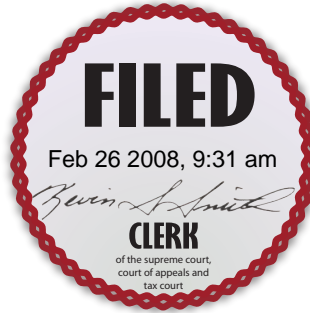


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ISAIAS CADENA,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A04-0705-CR-284

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No.20D03-0107-CF-81

February 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Isaias Cadena appeals his convictions of child molesting, a Class A felony, and sexual misconduct with a minor, a Class B felony. On appeal, Cadena raises one issue, which we restate as whether the trial court properly denied Cadena's motion for a change of judge. Concluding the trial court properly denied Cadena's motion, we affirm.

Facts and Procedural History

The facts of Cadena's case are detailed in two previous unpublished appellate decisions, Cadena v. State, No. 20A05-0510-PC-579, slip op. at 2-4 (Ind. Ct. App., Oct. 2, 2006) and Cadena v. State, No. 20A03-0206-CR-176, slip op. at 2 (Ind. Ct. App., Feb. 4, 2003), trans. denied. To summarize, the State charged Cadena with child molesting, a Class A felony, sexual misconduct with a minor, a Class B felony, and battery, a Class A misdemeanor. A jury convicted Cadena on all counts, and this court affirmed Cadena's convictions on direct appeal. Cadena, No. 20A03-0206-CR-176, slip op. at 7. However, on appeal from the denial of his petition for post-conviction relief, this court reversed Cadena's convictions of child molesting and sexual misconduct and ordered a new trial on those counts, concluding that Cadena was denied effective assistance of counsel. Cadena, No. 20A05-0510-PC-579, slip op. at 12.

On remand, the trial court increased Cadena's bond to \$250,000, having previously set bond at \$50,000 when the State initially brought charges against him. On December 7, 2006, Cadena filed a motion for bond reduction and a motion for change of judge. In the latter motion, Cadena alleged that the judge, who had presided over Cadena's previous

proceedings, was biased against him based on rulings made during the previous proceedings and the unreasonably high bond amount on remand. On December 14, 2006, the trial court denied the motion for a change of judge. Following a hearing on December 21, 2006, the trial court granted Cadena's motion for bond reduction, reducing the amount to \$100,000. On January 18, 2007, Cadena filed a motion to reconsider the denial of his change of judge motion, which the trial court denied on the same day.

On March 27, 2007, the jury found Cadena guilty of both counts. The trial court sentenced Cadena to thirty years for child molesting and ten years for sexual misconduct with a minor. The trial court also ordered that the sentences run consecutively, resulting in an aggregate sentence of forty years. Cadena now appeals.

Discussion and Decision

Cadena argues the trial court improperly denied his motion for a change of judge. This court reviews the trial court's denial of a motion for change of judge for clear error. Sturgeon v. State, 719 N.E.2d 1173, 1182 (Ind. 1999). We begin our review with the presumption that the judge is unbiased and unprejudiced. Garland v. State, 788 N.E.2d 425, 433 (Ind. 2003). We will not reverse the trial court's decision unless we are left with a definite and firm conviction that a mistake has been made. Sturgeon, 719 N.E.2d at 1182.

Indiana Code section 34-35-4-2(b) permits a party to move for a change of judge where, as here, convictions are reversed on appeal and a new trial is ordered. Determining whether to grant such a motion is governed by Criminal Rule 12(B), which requires the moving party to file an affidavit that states the "historical facts" and "reasons" for the judge's

alleged bias or prejudice against the moving party. Criminal Rule 12(B) also states the motion “shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.” Our supreme court has explained that “a change of judge is neither automatic nor discretionary, but rather requires the trial judge to make a legal determination, not a self-analysis, of actual bias or prejudice.” Voss v. State, 856 N.E.2d 1211, 1216 (Ind. 2006). In making this determination, the trial court is required “to examine the affidavit, treat the facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.” Id. (quoting Sturgeon, 719 N.E.2d at 1181).

Cadena’s affidavit alleges that three historical facts support an inference of bias or prejudice: 1) the judge stated during the sentencing hearing that “the evidence ‘overwhelmingly demonstrated guilt,’”¹ appellant’s brief at 7-8; 2) the judge found aggravating circumstances when he sentenced Cadena; and 3) the judge set Cadena’s bond at an unreasonably high amount. Cadena states that the first and second historical facts constitute prior judicial rulings and acknowledges that judicial rulings “generally do not support a rational inference of prejudice.” Id. at 8 (citing Voss, 856 N.E.2d at 1217). Cadena also notes our supreme court has recognized that “there may be circumstances in

¹ Cadena does not provide a citation to the record for this statement, apparently because the sentencing hearing transcript was not included in his appendix or as part of the record in general. The statement is referenced briefly in one of the previous appellate decisions, see Cadena, No. 20A05-0510-PC-579, slip op. at 11 (“The trial court similarly found that the evidence ‘overwhelmingly demonstrated guilt.’” (citing Appellant’s Appendix at 70)), but it would have been helpful for us to understand the context in which the judge made this statement. To that end, we remind Cadena’s counsel that Indiana Appellate Rule 46(A)(8)(a) states that “the argument must contain the contentions of the appellant on the issues presented,

which a rational inference of prejudice may be established from a judge's prior orders if the orders are sufficiently egregious." Id. (quoting Voss, 856 N.E.2d at 1217). Cadena does not, however, argue that the trial court's rulings were made in bad faith, cf. Voss, 856 N.E.2d at 1217 (concluding the judge's rulings did not support a rational inference of prejudice because although they were reversed on appeal, "his decisions in each were supported by reasonable legal argument and the applicable law was subject to a good faith difference of opinion at the time"), nor has he otherwise explained why these rulings constitute an exception to the general rule that adverse judicial rulings do not support a rational inference of prejudice.

Regarding the trial court's decision to set bond at \$250,000, we note that this decision also constitutes a judicial ruling. In Allen v. State, 737 N.E.2d 741, 744 (Ind. 2000), our supreme court concluded there was no rational inference of bias or prejudice where the judge set bond at \$100,000 despite the fact that the State requested an amount of only \$50,000. Cadena does not attempt to distinguish Allen, and overlooks that the trial court reduced the bond amount to \$100,000 after hearing evidence on his motion for bond reduction. In light of our supreme court's conclusion in Allen and the fact that the trial court granted Cadena's motion, we are not convinced the trial court's initial decision to set bond at \$250,000 supports an inference of bias or prejudice.

Cadena bore the burden of demonstrating that the historical facts in his affidavit supported an inference of bias or prejudice. Based on the foregoing, we cannot say with

supported by cogent reasoning. Each contention must be supported by citations to . . . the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."

definite and firm conviction that the trial court made a mistake in denying Cadena's motion. Thus, it follows that the trial court's decision was not clearly erroneous.

Conclusion

The trial court properly denied Cadena's motion for a change of judge.

Affirmed.²

FRIEDLANDER, J., and MATHIAS, J., concur.

² On February 5, 2008, this court received a letter from Cadena dated February 3, 2008, in which he claimed that his counsel was not keeping him adequately apprised of his appeal. Although we express no opinion on the merits of Cadena's claim, consistent with Indiana Professional Conduct Rule 1.4(a), we expect that counsel will notify Cadena of this opinion.