In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00059-CV

IN RE COMMITMENT OF ERNEST LEROY SMITH

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 14-06-06208 CV

MEMORANDUM OPINION

Ernest Leroy Smith appeals from a jury verdict that resulted in his civil commitment as a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.001–.151 (West 2010 & Supp. 2015) (the SVP statute). In three issues, Smith argues (1) the judge hearing Smith's motion to recuse erred by excluding evidence Smith argues was relevant to whether the judge assigned to serve as the presiding judicial official at his trial should be recused, (2) the judge hearing Smith's motion to recuse erred by failing to grant his motion to recuse, and (3) the judge presiding over Smith's civil commitment trial erred by denying his motion

for mistrial. We conclude that Smith's issues are without merit, and we affirm the trial court's judgment and order of civil commitment.

Procedural Background — Smith's Recusal Motion

Smith filed a recusal motion one business day before the date Smith's trial was scheduled to begin. In his motion, Smith moved to recuse the judicial official assigned to try his case, Judge Michael T. Seiler, on the ground that Judge Seiler's impartiality could reasonably be questioned due to Judge Seiler's alleged views regarding defendants involved in sexually violent commitment proceedings. *See* Tex. R. Civ. P. 18b(b) (Grounds for Recusal). As required by the Texas Rules of Civil Procedure, Judge Seiler referred Smith's motion to the presiding administrative judge for the Second Administrative Judicial Region. *See* Tex. R. Civ. P. 18a(f)(2)(A). The administrative judge assigned Judge Lisa Michalk to hear Smith's motion to recuse.

Prior to the recusal hearing, Smith amended his motion, clarifying the grounds on which he was seeking Judge Seiler's recusal. Subsequently, Judge Michalk conducted a joint hearing on the motion filed by Smith and three other SVP defendants who were seeking to have Judge Seiler recused from presiding over their trials. At the conclusion of the recusal hearing, Judge Michalk denied all of the motions, including Smith's.

Appellate Issues that Relate to the Recusal Ruling

In issue one, Smith contends that Judge Michalk abused her discretion by excluding a photograph of a sign Judge Seiler used during a campaign for judicial office. Judge Michalk excluded the photograph based on her conclusion that it was not properly authenticated for the purposes of the hearing. The State did not object when Smith tendered the photograph during the hearing on his motion to recuse, but Judge Michalk stated that she was unwilling to consider the photograph because the evidence regarding it failed to establish whether the sign was from Judge Seiler's initial campaign for election or from his reelection campaign.

We considered the impact of the sign in the photograph in two previous appeals in which we addressed rulings on motions seeking Judge Seiler's recusal in two other cases that involved civil commitment proceedings. *See In re Commitment of Terry*, No. 09-15-00053-CV, 2015 WL 5262186, at *2 (Tex. App.—Beaumont Sept. 10, 2015, pet. denied) (mem. op.); *see also In re Commitment of Winkle*, 434 S.W.3d 300, 310-13 (Tex. App.–Beaumont 2014, pet. denied). Terry's appeal from a ruling denying the motion to recuse that he filed, also unsuccessful, arose from the same recusal hearing that is at issue here. *Terry*, 2015 WL 5262186, at *2. In *Winkle*, a case that involved a different hearing than the hearing at issue here, we explained that the campaign slogan on the sign at

issue, "A prosecutor to judge the predators," could refer to Judge Seiler's resume as a former prosecutor. Consequently, we concluded that the slogan did not necessarily represent a promise by Judge Seiler to act as a prosecutor when he heard sexually violent predator cases generally, or in hearing Winkle's case. *Winkle*, 434 S.W.3d at 312. Even if we were to assume the trial court erred by excluding the photograph of the sign, a matter we need not decide, Smith was not harmed by the trial court's decision to exclude the photograph. The photograph at issue does not reflect that Judge Seiler promised to act in a certain way when presiding over cases seeking to civilly commit alleged sexually violent predators. *Terry*, 2015 WL 5262186, at *1; *see* Tex. R. App. P. 44.1(a)(1). Moreover, as we explain in issue two, Smith's motion was untimely, so any alleged evidentiary rulings would not have been harmful for that reason as well. Tex. R. Civ. P. 18a(b)(1)(B). We overrule issue one.

In issue two, Smith argues that Judge Michalk should have granted his motion based on Judge Seiler's alleged "deep-seated bias" against respondents in civil commitment proceedings. Under Texas law, a judge must be recused when his "impartiality might reasonably be questioned[,]" or he has a "personal bias or prejudice concerning the subject matter or a party[.]" Tex. R. Civ. P. 18b(b)(1), (2). The complaining party "must show that a reasonable person, with knowledge

of the circumstances, would harbor doubts as to the impartiality of the trial judge," and demonstrate "that the bias is of such a nature and extent that allowing the judge to serve would deny the movant's right to receive due process of law." *Winkle*, 434 S.W.3d at 311. We review the denial of a motion to recuse under an abuse of discretion standard. *Id.* at 310.

In its brief, the State argues that the trial court properly decided the motion to recuse because Smith's motion was untimely. The Texas Rules of Civil Procedure do not allow motions to recuse to "be filed after the tenth day before the date set for trial" unless, before that date, "movant neither knew nor reasonably should have known[] that the judge whose recusal is sought would preside at the trial or hearing[,]" or "that the ground stated in the motion existed." Tex. R. Civ. P. 18a(b)(1)(B). We note that although Smith failed to comply with this rule, the State did not object at the hearing on the basis that Smith's motion to recuse was untimely. In *Terry*, unlike the timing of the filings at issue here, Terry filed a timely motion to recuse Judge Seiler, but he then amended the motion less than ten days before the hearing. *See Terry*, 2015 WL 5262186, at *1. Under those circumstances, we held that Terry's failure to obtain leave to file an amended motion within ten days of the hearing was cured because the trial court considered and acted on the amended motion. *Id.*

In Smith's case, both Smith's motion to recuse and his amended motion to recuse were filed less than ten days before the date the case was set for trial. *See* Tex. R. Civ. P. 18a(b)(1)(B). While Judge Michalk conducted a hearing and ruled on the motion, she noted that one of the reasons she was denying Smith's motion was that he had waited until the eve of trial to seek Judge Seiler's recusal even though Smith's counsel was aware of the facts relevant to his motion more than one year before he filed his motion. Thus, in Smith's case, the recusal court in denying Smith's motion to recuse considered that Smith had not filed his motion to recuse "as soon as practicable." *See* Tex. R. Civ. P. 18a(b)(1)(A).

In Smith's appellate brief, he suggests that he filed his motion as soon as practicable after learning that a motion to recuse Judge Seiler had recently been granted in another case. Smith argues that Judge Michalk abused her discretion in finding his motion was untimely because, notwithstanding the plain language of Rule 18a(b)(1), "[t]here is no expiration date on judicial prejudice and bias and the appearance of such."

In *Terry*, we addressed whether Judge Michalk abused her discretion in denying a motion to recuse Judge Seiler on the merits of Terry's motion. *See Terry*, 2015 WL 5262186, at *2. In that case, we held that Judge Michalk "was entitled to presume that Judge Seiler would 'divest himself of any previous

conceptions, and ... base his judgment, not on what he originally supposed but rather upon the facts as they are developed at the trial.'" *Id.* at *3 (quoting *Lombardino v. Firemen's & Policemen's Civil Serv. Comm'n*, 310 S.W.2d 651, 654 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.)). We reasoned that "[i]n doing so, as in *Winkle*, [Judge Michalk] could reasonably conclude that Judge Seiler's statements did not constitute such bias or prejudice as to deny Terry a fair trial." *Id.* The same reasoning applies to Smith's appeal, but we need not decide the case on the merits based on Judge Michalk's finding that Smith's motion to recuse Judge Seiler was untimely.

Here, Smith's calculation that he might succeed on his motion seeking Judge Seiler's recusal likely improved after he learned a similar motion in another court had recently been granted. However, the record before us shows that another attorney employed by The Office of State Counsel for Offenders had filed a similar motion seeking Judge Seiler's recusal more than a year earlier in another SVP case, and the motion in Winkle's case was based on the same evidence regarding Judge Seiler's extra-judicial comments that is at issue here. *Winkle*, 434 S.W.3d at 310. During the hearing before Judge Michalk, Smith's attorney, also an employee of The Office of State Counsel for Offenders, advised Judge Michalk that the exhibits offered into evidence to support Smith's motion had been considered by

the judge who conducted the recusal hearing in *Winkle*. In our opinion, Judge Michalk's conclusion that Smith's motion was untimely because he failed to file his motion as soon as practicable after knowing of the grounds supporting his motion is a finding that is supported by the record. We hold that Smith's untimeliness in filing his motion served as a proper basis on which Judge Michalk could reasonably deny Smith's motion. We overrule issue two.

Trial on the Merits — Motion for Mistrial

In issue three, Smith complains of Judge Seiler's decision denying his motion for mistrial. Smith moved for mistrial after the State's expert witness testified about the results of a polygraph examination, a test that Smith had taken during the investigation of a sexually violent offense that occurred approximately twenty years before his civil commitment trial.

The evidence regarding the fact that Smith had taken a polygraph approximately twenty years earlier arose during the testimony of Dr. Lisa Clayton, a psychiatrist. Dr. Clayton testified that she formed an opinion that Smith suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence. Her opinion was based upon her education, her training, and her methodology, which included her review of Smith's criminal records. During her testimony, Dr. Clayton described Smith's prior offenses, which included (1) an

aggravated sexual assault of a six-year-old girl that Smith committed when he was sixteen, (2) an incident involving indecency with a child that Smith committed approximately six months after he was released from confinement by the Texas Youth Commission, (3) an incident involving an inappropriate relationship with a sixteen-year-old girl, which resulted in the revocation of Smith's parole, and (4) an incident involving an aggravated sexual assault committed by Smith on a five-year-old boy while Smith was under an order requiring his mandatory supervision. According to Dr. Clayton, the various records she reviewed indicated that Smith's last victim reported that Smith made him engage in sexual activity with two other children.

When Dr. Clayton was explaining the sources of information that she had used in forming her opinions in Smith's case, counsel for the State asked Dr. Clayton if she had heard Smith testify before the jury that he denied having committed offenses against the two children that were mentioned by Smith's last victim in the various records that Dr. Clayton reviewed. Dr. Clayton replied, "Yes, and maybe he, by his own, thinks that he didn't do anything to them because he made [his five-year-old victim] do it to the kids." Following up on that answer, counsel for the State asked Dr. Clayton, "did [Smith] make any statements to the police at the time . . . of this offense?" Dr. Clayton replied, "There is a narrative or,

I guess, a report that the police had told him that they wanted him to take a polygraph about this, and during this evaluation that -- oh, and on the polygraph -- he did take a polygraph and it showed deception[.]" The trial court sustained Smith's objection to any mention of the polygraph, and at Smith's request, the trial court instructed the jury to disregard any mention of the polygraph because it was not admissible and was not relevant to the proceedings. However, the trial court denied Smith's motion when he asked for a mistrial. Counsel for the State then asked Dr. Clayton again about what Smith told the police when they detained him for the offense involving the five-year-old boy, and she answered:

> He told them that he was sexually attracted to little -- I guess four- to six years old, that he couldn't -- he had -- well, couldn't -- he said -- when asked how many kids he had ever touched or molested, he said, "Too many." He said, "I think I'm beyond help." He said, "Because I know without a doubt if I get into the situation again, it will happen."

It appears that Dr. Clayton's last response was the response the State was seeking when Dr. Clayton volunteered the information about the polygraph. Smith's statement to the police, as reflected by Dr. Clayton's response, indicated that Smith told police he was beyond help. Clearly, Smith's admission was relevant to the State's claim that based on Smith's history, Smith lacked the ability to control his sexual impulses. The respondent's ability to control his sexual impulses is an issue that is often one of the matters in dispute in SVP trials. *See*

Tex. Health & Safety Code Ann. § 841.002(2) (defining the term "behavioral abnormality") (West Supp. 2015).

Generally, the results of a polygraph examination are inadmissible in civil suits. *See Cent. Mut. Ins. Co. v. D. & B., Inc.*, 340 S.W.2d 525, 527 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.). Smith argues that Dr. Clayton's testimony about the results of the polygraph examination impeached Smith's testimony that he did not commit a sexual offense against two of the children, and he suggests the evidence was designed to demonstrate that he had not accepted responsibility for his actions. However, there was other evidence that Smith had committed sexual offenses against various other children, as he admitted during the trial that he committed sexual offenses as a juvenile, as a young adult after he was released from juvenile detention, after he was released on parole, and after he was released on mandatory supervision. Smith essentially agreed during the trial that his history showed he had little control over his sexual impulses over much of his past, as he agreed at the trial that "I was really screwed up back then."

The question that the State posed to Dr. Clayton that resulted in her mention of the polygraph appears to have been intended to elicit a response about Smith's inability to control his sexual impulses; the trial court was not required to view the question as one designed to inject testimony about a twenty-year-old polygraph

into the case on trial. Dr. Clayton's mention of the polygraph was a response the trial court could reasonably conclude the State had not anticipated based on the question that it posed to Dr. Clayton. After the trial court ruled the polygraph inadmissible and advised the jury it was not relevant, counsel representing the State did not mention the polygraph again. Counsel for the State also did not subsequently attempt to capitalize on the fact that Dr. Clayton had mentioned the polygraph. Moreover, Smith admitted that he had engaged in sexual contact with many children over a significant period of time even though the consequences from these contacts resulted in several incarcerations, a circumstance indicating that Smith had, based on his history, exhibited a lack of adequate control over his sexual impulses.

A mistrial is required only when the improper evidence is so clearly calculated to inflame the minds of the jurors and is such a character as to suggest the impossibility of withdrawing the impression. *Taylor v. State*, No. 03-14-00173-CR, 2015 WL 6119515, at *14 (Tex. App.—Austin Oct. 14, 2015, pet. ref'd). In this case, the State did not use the evidence regarding the polygraph in a manner calculated to inflame the jurors given the context of the issues resolved in this SVP trial; moreover, we have no reason to believe the jury disregarded the trial court's

instruction to ignore Dr. Clayton's mention of the polygraph. We overrule issue three. The trial court's judgment and order of commitment are affirmed.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on October 13, 2015
Opinion Delivered April 28, 2016

Before Kreger, Horton, and Johnson, JJ.