

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE COUNTY OF CHARLEVOIX

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

WAYNE DAVID WYNKOOP,

Defendant.

File No. 09-201-SM-1
HON. PHILIP E. RODGERS, JR.
(By Assignment)

James R. Linderman (P23088)
Special Prosecuting Attorney
Attorney for Plaintiff

Robert Kaufman (P26719)
Attorney for Defendant

DECISION AND ORDER DENYING DEFENDANT'S
THIRD MOTION TO DISQUALIFY JUDGE RICHARD W. MAY

The Defendant has filed a third motion to disqualify Judge Richard W. May. This Court has reviewed the parties' briefs and the record and dispenses with oral argument. MCR 2.119(E)(3). For reasons that will now be described, the motion is denied.

The Defendant was the supervisor of Norwood Township before he resigned in November of 2007. He is also the owner of Norwood Limestone Quarry, LLC, with his wife, Micheline Wynkoop. In June of 2007, the Norwood Planning Commission approved a special use permit to Norwood Limestone Quarry to mine. Between May and November of 2007, Norwood Limestone Quarry was granted a contract by the Charlevoix County Road Commission to provide 23A aggregate. The Defendant was paid by the Road Commission and then the Township paid the Road Commission. The Defendant, a public official, allegedly did not disclose to the public or the Township board that he was going to bid on the 23A aggregate or that he received the bid. The Defendant was charged with a violation of the Contracts of Public Servants Act, MCL 15321, *et seq*, and the case was assigned to the Honorable Richard W. May.

On May 12, 2009, the Defendant presented his first motion for Judge May to disqualify himself. The stated reasons for seeking disqualification were: (1) the Defendant “intends to argue that the pending prosecution is an unconstitutional selective prosecution at the instigation of his political enemies and calculated to punish him for incurring their irrelevant displeasure rather than [sic] to uphold the law” and Judge May might have to pass upon the testimonial credibility of Judge Richard Pajtas who sits in the same court building as Judge May, when he is called to testify “as to the history of his past bad relations with [the Defendant], his strong personal dislike for [the Defendant], and his knowledge of circumstances culminating in issuance of the pending complaint and any warrants for [the Defendant’s] arrest; and (2) Judge May declined to order the court clerk or prosecuting attorney to produce copies of any warrant or warrants issued for the Defendant’s arrest because he knew for a fact that no such warrant(s) issued and, thus, made himself a material fact witness in the case.”

At the hearing on the motion, Judge May heard the testimony of the complainant, Detective Sergeant White, who testified that her investigative report and the complaint refer to a “warrant,” but that she used the word “warrant” as synonymous with the word “complaint” and that no warrant was ever issued for the Defendant’s arrest. The complaint was presented to and authorized by Judge May.

Judge May denied the motion for the reasons stated on the record: to-wit, no warrant was issued and the issue of whether this prosecution is an unconstitutional selective prosecution is a question of law and not an issue that will be tried to the jury. The Defendant indicated that he would seek *de novo* review of the Court’s ruling.

After the hearing on May 12, 2009, the special prosecutor asked permission to approach the bench on an unrelated matter. According to the Affidavit of Judge May, he had lost his mother two days before the hearing. The special prosecutor learned of this tragedy the day before the hearing. He approached the bench to express his condolences and shook hands with the Judge. All of the affidavits submitted by the Defendant confirm that the special prosecutor shook hands with the Judge. Only one, the affidavit from the Defendant’s wife, indicates that she saw the Judge mouth the words: “Good job.” Defense counsel did not raise the issue of any impropriety at that time, but subsequently filed a second motion to disqualify Judge May based on an “Unseemly Public Display of Solidarity with the Prosecution.”

This Court was assigned to conduct the *de novo* review of the Defendant's first and second motions to disqualify Judge May. The Court heard the oral arguments of counsel on Monday, June 15, 2009 and took the matter under advisement. On June 23, 2009, the Court issued a written decision and order, affirming the trial court's ruling for the reasons stated therein.

On August 31, 2009, the Defendant filed a Third Motion to Disqualify Hon. Richard W. May. Judge May heard the motion on September 3, 2009 and, on September 8, 2009, entered an Order denying the motion. This Court was again assigned to conduct the *de novo* review.

Law and Analysis

MCR 2.003 governs disqualification of a judge and provides, in pertinent part, as follows:

* * *

(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

* * *

This court rule was promulgated to protect the rights of parties to litigation and to avoid impropriety and the appearance of impropriety. See Code of Judicial Conduct, Canon 2; *Cain v Dep't of Corrections*, 451 Mich 470; 548 NW2d 210 (1996); *In re Lawrence*, 417 Mich 248, 256; 335 NW2d 456 (1983).

Due process requires a hearing before an unbiased and impartial decision-maker. *In re Murchison*, 349 US 133, 136; 75 S Ct 623, 625; 99 L Ed 942 (1955); *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Even without a showing of actual bias, a decision-maker may be disqualified "where 'experience teaches that the probability of actual bias on the part of the . . . decision-maker is too high to be constitutionally tolerable.'" *Id.*, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). In *Withrow*, the Court said:

Not only is a biased decision-maker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ *In re Murchison, supra*, at 136; *Tumey v Ohio*, 273 US 510, 532; 47 S Ct 437, 444; 71 L Ed 749 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome [*Gibson v Berryhill*, 411 US at 579; 93 S Ct at 1698; *Ward v Village of Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927). Cf. *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145; 89 S Ct 337; 21 L Ed 2d 301 (1968)] and in which he has been the target of personal abuse or criticism from the party before him. [*Taylor v Hayes*, 418 US 488, 501-503; 94 S Ct 2697, 2704-2705; 41 L Ed 2d 897 (1974); *Mayberry v Pennsylvania*, 400 US 455; 91 S Ct 499; 27 L Ed 2d 532 (1971); *Pickering v Board of Education*, 391 US 563, 578-579, n 2; 88 S Ct 1731, 1739-1740; 20 L Ed 2d 811 (1968). Cf. *Ungar v Sarafite*, 376 US 575, 584; 84 S Ct 841, 846; 11 L Ed 2d 921 (1964).]

Under MCR 2.003(B)(1), a judge may be disqualified on a showing of actual personal bias or prejudice. *Cain v MDOC*, 451 Mich 470, 495; 548 NW2d 210 (1996); *In re Hamlet*, 225 Mich App 505, 524; 571 NW2d 750 (1997). However, disqualification is warranted only when “the bias or prejudice is both personal and extrajudicial.” *Cain, supra* at 495. The party claiming bias “must overcome a heavy presumption of judicial impartiality.” *In re Hamlet, supra* at 524.

In his third motion, the Defendant contends, first and foremost, that Judge May should be disqualified because he is “pro-prosecution.” He claims that, during an in-chambers meeting between counsel for both sides and the Judge, the Judge threatened him “with a penal fine over fifty times greater than the maximum authorized by law on the sham pretense of ‘restitution’” and collaborated with the prosecution “to create an opportunity for the prosecutor off-the-record to threaten him with a groundless competency hearing.”

At the hearing on the Defendant’s motion, the prosecutor and Judge May adequately explained that defense counsel misinterpreted what had occurred during the in-chambers meeting and had attributed certain pre-judgments and intentions to the Judge that simply did not exist. For example, the prosecutor acknowledged at the hearing that he offered to seek only the difference between the price the Defendant charged for the aggregate and the lowest bid, rather than the full amount he was paid for the aggregate, as restitution, if the Defendant plead guilty. He stated that the Judge did not express any opinion on that. The Judge confirmed this.

The Judge acknowledged asking whether the Defendant could benefit from his crime, but merely as an open question, not as an indication that he had made a decision on restitution.

Similarly, when the prosecutor questioned whether the Defendant was competent, the Judge told him to file a motion. Defense counsel interpreted this exchange to be a collaboration to threaten his client "with a groundless competency hearing and the attendant risk of pseudo-therapeutic assault, battery, and false imprisonment." However, as Judge May pointed out at the hearing, filing a motion to get a ruling "is what we normally do as a court." Telling counsel to file a motion is a frequent, perfectly logical response by a judge. Attorneys often complain that courts should do this or that, but if they do not file a motion, the court has no authority to act. Other explanations on the record of the hearing for conduct that defense counsel thought was objectionable were equally understandable, logical and left this Court with the clear impression that defense counsel was unjustifiably suspicious and overreacted.

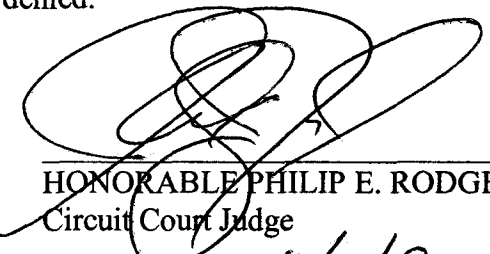
As for the third and final ground for disqualification, to-wit: the Judge signed an amended complaint "knowing that it was predicated on perjured matter," the basis for the complaint was a ground alleged for disqualification in his earlier motions. As such, this Court has already ruled on this matter and will not address it again.

Conclusion

The record is devoid of factual support for the proposition that Judge May is "pro-prosecution." The Defendant has failed to meet his burden. He has not overcome the presumption of judicial impartiality.

Again, this case is set for a jury trial. Judge May will not be the fact finder. He will not be assessing the credibility of witnesses. As in any jury trial, the jurors will be instructed to absolutely disregard any impression they may have regarding the Judge's personal opinions about the case. Questions of law are reviewed *de novo* on appeal. Therefore, the Defendant's Third Motion to Disqualify Judge May is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

10/15/09