Circuit Court for Montgomery County
Case Nos.: 128191C, 129945C, 129948C,
129949C, & 130210C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 134

September Term, 2019

EFFREM ANTOINE CONNER

v.

STATE OF MARYLAND

Meredith,
Friedman,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.
Dissenting Opinion by Friedman, J.

Filed: June 26, 2020

In 2016, Appellant, Effrem Antoine Conner, entered into a plea agreement which resolved a series of pending theft charges and outstanding violations of probation, all of which stemmed from events that took place in Montgomery County. A judge sitting in the Circuit Court for Montgomery County sentenced him to 15 years' imprisonment, but suspended all of the time and imposed five years' probation, the terms of which included that Conner enroll in and successfully complete the Montgomery Adult Drug Court program.

In 2018, a petition to revoke Conner's probation was filed, alleging that Conner had failed on several occasions to adhere to the requirements of the Drug Court. After a revocation of probation hearing was held, the Honorable John Maloney of the Circuit Court for Montgomery County determined that Conner had violated the terms of his probation and sentenced him to ten years' imprisonment. Conner then filed an application for leave to appeal the revocation to this Court, which we granted; we then transferred the case to the regular appellate docket. Before us, Conner raises the following questions for our review:

> 1. Whether the Circuit Court erred in denying Appellant's motion seeking recusal of the "Montgomery County Adult Drug Court Judges" in the violation of probation proceeding.
>
> 2. Whether the Circuit Court erred in denying Appellant's motion to dismiss certain violation of probation charges based on double jeopardy, res judicata, or collateral estoppel because Appellant had previously been sanctioned by the Drug Court for those violations.

For the reasons that will become clear, we shall affirm.

BACKGROUND

Drug Court is a type of "problem-solving court program," a "specialized court docket or program that addresses matters under a court's jurisdiction through a multidisciplinary and integrated approach incorporating collaboration by the court with other governmental entities, community organizations, and parties." Rule 16-207(a).[1] Such programs are intended to address "defendants whose presence in the criminal justice system appears to be traceable, at least in part, to an underlying issue such as substance abuse." *State v. Brookman*, 460 Md. 291, 296 (2018) (footnote omitted).

"[P]articipants in the program are subject to a highly structured probation," rather than incarceration, "that includes treatment and monitoring." *Id.* A typical drug court program is "divided into several phases of diminishing intensity as the participant progresses in accordance with the program's goals" and consists of "frequent status review hearings involving a judge assigned to the program and other court personnel." *Id.* at 296–97 (footnote omitted).

In *Brookman*, *supra*, 460 Md. 291, the Court of Appeals described such programs as team-based "rather than an adversarial process," and noted that the "key team members" of the program include "the judge (referred to as the team leader), the program coordinator, the prosecutor, defense counsel, case managers, and treatment providers." *Id.* at 301. If a participant violates the terms of the program, that individual may be "punished with a series

[1] Amendments to Rule 16-207 were made in 2019, none of which, however, altered the language of the provisions relevant to our discussion of the issues.

of graduated sanctions, some of which derive from the court's coercive powers." *Id.* at 297 (footnote omitted); *see also* Rule 16-207(f).[2]

To be accepted into a drug court program, a participant must sign a written agreement. Rule 16-207(e)(1). The written agreement must set forth "the requirements of the program," "the range of sanctions that may be imposed while the participant is in the program," and "any waiver of rights by the participant." *Id.* The agreement also must provide "the protocols of the program, including protocols concerning the authority of the judge to initiate, permit, and consider *ex parte* communications pursuant to Rule 18-102.9 of the Maryland Code of Judicial Conduct."[3] *Id.* The Rule requires that, as a further condition of acceptance into the program, the trial court must have a colloquy with the prospective participant, on the record, and, thereafter, explicitly find that the applicant is acting knowingly and voluntarily with respect to entering the program. Rule 16-207(e)(2). In the event a participant is terminated from the program, the Rule also provides any credit

[2] Rule 16-207(f), Immediate Sanctions; Loss of Liberty or Termination from Program, in pertinent part, provides:

> If permitted by the program and in accordance with the protocols of the program, the court, for good cause, may impose an immediate sanction on a participant, except that if the participant is considered for the imposition of a sanction involving the loss of liberty or termination from the program, the participant shall be afforded notice, an opportunity to be heard, and the right to be represented by an attorney before the court makes its decision.

[3] Rule 2.9 of the Code of Judicial Conduct, currently numbered as Rule 18-102.9, permits a judge serving in a problem-solving court program to "initiate, permit, and consider ex parte communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols." Rule 18-102.9(a)(6).

for time spent incarcerated as a sanction for any program violation must be credited against any period of incarceration to be served following the termination of the participant's involvement. Rule 16-207(g).

The Montgomery County Adult Drug Court Program, established by the Circuit Court for Montgomery County in December 2004, "is a comprehensive, voluntary treatment program for adult offenders suffering from drug and alcohol dependence." Montgomery County Circuit Court, *Overview of the Adult Drug Court Program*, https://www.montgomerycountymd.gov/cct/drug-court.html, last visited June 17, 2020 [*archived at* https://perma.cc/AP3G-5G6F]. The objective of the Montgomery County program is "to reduce recidivism by providing intensive services and supervision to address substance dependence and criminal thinking." *Id.* A defendant may be accepted in the program as a condition of probation following a guilty plea or as a consequence of being charged with a violation of probation. *See id.* Upon successful completion of the program, a participant is eligible for release from probation.

In September of 2016, Conner, the Appellant herein, as a condition of his probation, executed the Montgomery County Adult Drug Court agreement, the provisions of which, relevant to the grounds for the revocation of his probation, included:

> - I agree to attend a **minimum** of three (3) recovery meetings per week for ever week that I am in Drug Court unless incarceration or inpatient treatment prevents me from doing so.
>
> - I will be on time for all substance abuse treatment groups, appointments, and court appearances. Failure to appear for any of these obligations could lead to the issuance of a bench warrant.

- I agree that I will not use, possess, or knowingly associate with any person who uses or possesses any controlled substance or illegal drug including, but not limited to, cocaine (powder, base, or "crack"), opiates, heroin, methadone, buprenorphine, methamphetamines, benzodiazepines, K2, MDMA, psilocybin, butane hash, or LSD.

- I agree that I will not use or possess alcohol or marijuana or any other substance that will compromise my sobriety. I understand that using or possessing any of these substances will result in a violation of the terms of my probation.

- I understand that I can be asked to report for drug and alcohol testing at any time while I am a Drug Court participant and that my failure to report will result in a sanction by the Court.

- I also understand that any attempt to falsify a drug and alcohol test, including dilution, is grounds for termination from drug court.

- I understand that Drug Court imposes graduated sanctions for lack of compliance with program requirements, including incarceration. I have the right to request and have a formal adversarial hearing before the imposition of a sanction of incarceration or before being terminated from Drug Court.

- I understand that if I fail to complete Drug Court, the court will terminate me from the program and sentence me in accordance with the law.

(Emboldened in original). Conner also signed a "Consent for Disclosure of Confidential Alcohol and Drug Abuse Treatment and Related Medical Information" form, in which he agreed that "ongoing verbal and written communication about" his compliance with the program could be shared with individuals and agencies involved with the Adult Drug Court Program.[4] The Consent form further provided:

[4] The "Consent for Disclosure and Confidential Alcohol and Drug Abuse Treatment and Related Medical Information" form signed by Conner provided that any communication about his compliance with the program's requirements would be shared

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- I understand that information about my medical status, mental health and/or drug treatment status, my arrest history, my levels of compliance or non-compliance with the conditions of my Drug Court participation (including the results of urinalysis or other drug screening tools) and other material information will be discussed and shared among members of the Drug Court Team.

- I further understand that summary information about my compliance or non-compliance will be discussed in open court, specifically, whether I have attended all meetings, treatment sessions, the results of urinalysis or other testing as required, and the disclosure of my compliance or non-compliance with the terms and conditions of my probation as defined by the Court.

Initially, Conner was remanded to the Montgomery County Detention Center Pre-Release Center for nine months, but was later committed to an inpatient facility before the expiration of those nine months. Between October of 2016 and January of 2018, Conner, on several occasions, tested positive for drugs or alcohol or had submitted urine samples with low levels of creatinine,[5] which had resulted in various other drug court sanctions, including additional periods of incarceration and other reprimands by the Drug Court.

In 2018, a Revocation of Probation petition was filed, alleging that Conner had violated multiple terms of the Drug Court program by: testing positive for cocaine on three

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with the Montgomery County Circuit Court, including judges and support staff, Montgomery County Department of Health and Human Services staff, Maryland Treatment Centers, Montgomery County State's Attorney's Office, Office of the Public Defender or private defense counsel, Maryland Department of Parole and Probation, among others.

[5] "A low creatinine level may be an indication that a participant in [a drug court] program has attempted to defeat a urinalysis test for illicit drugs by consuming an excessive amount of water to dilute the participant's urine." *State v. Brookman*, 460 Md. 291, 302 n.13 (2018).

occasions; admitting to alcohol consumption on two occasions; failing to attend treatment on one occasion; providing urine samples with low creatinine levels on six occasions; testing positive for ethyl glucuronide on one occasion[6]; failing to contact his case manager as required on one occasion; attempting to falsify a urine sample; and failing to comply with all conditions of the Adult Drug Court Program. After having determined that Conner did, indeed, violate the terms of his probation as a drug court participant, Judge Maloney sentenced him to incarceration. Conner, before us, does not challenge the Judge's violation findings but contends that it was error for Judge Maloney to have presided over the violation of probation proceeding because of his role as a drug court judge.[7]

DISCUSSION

Conner argues that Judge Maloney erred in denying his pre-hearing "Motion to Recuse the Montgomery Adult Drug Court Judges"[8] from presiding over his violation of

[6] Ethyl glucuronide, or "ETG," a "minor non-oxidative hepatic metabolite of ethanol," when assessed in urine, "can detect alcohol use for up to five days depending on the cutoff level used and the amount of alcohol consumed." McDonell, Michael G. et al., *Using Ethyl Glucuronide in Urine to Detect Light and Heavy Drinking in Alcohol Dependent Outpatients*, 157 DRUG AND ALCOHOL DEPENDENCE 184-7 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4663163/ [*archived at* https://perma.cc/3Q5J-BKV8].

[7] Because Judge Maloney was the only Drug Court Judge to entertain arguments and rule on Conner's recusal motion, and because Conner failed to proffer any allegations specifying any other Drug Court Judges, our determination herein is limited to the record before us, obviously. It is unclear from the record whether Judge Maloney presided over any or all of Conner's other drug court violation hearings.

[8] At the time of the motion's filing, four of the twenty-four judges of the Montgomery County Circuit Court presided over Adult Drug Court proceedings.

probation hearing. In his motion, Conner posited that the Drug Court Judges should not adjudicate petitions for probation revocation involving the program's participants, because, as members of the Drug Court team, they are privy to information about the participants which would call into question their impartiality to decide such matters. Additionally, Conner proffered e-mails circulated among the Drug Court team, on which Judge Maloney had been copied, relaying incidents in which Conner was reported to have acted in derogation of the terms of the Drug Court agreement, contending that such exposure further compromises the impartiality of Judge Maloney to preside over his probation revocation hearing. Conner argued that such "extrajudicial communications regarding the disputed facts to be decided" at the violation of probation hearing would deny him "the presumption of innocence and create an appearance of impropriety inconsistent with his fundamental right for a fair trial."

Before the hearing, Judge Maloney denied the motion for recusal, but set forth his understanding of the nature of recusal and the need for evidence to support the State's case:

> [T]he Court does take motions for recusal very seriously . . ..
> And [Rule] 16-207, even indicates, which is the problem-solving court rule that the Court should be sensitive to any exposure or ex parte communication or inadmissible evidence that the judge may receive while participant was in the Drug Court Program,[9] and I'm sensitive to that, but sees from these e-mails the best I have is allegations.

[9] Judge Maloney, denying Conner's motion for recusal, refers to the Committee Note associated with Rule 16-207(f), *supra* note 2, which states:

> In considering whether a judge should be disqualified pursuant to Rule 18-102.11 of the Maryland Code of Judicial Conduct from post-termination proceedings involving a participant who has been terminated from a
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> (continued . . .)

> I'm going to direct the State not to have Mr. Stewart [the supervisory therapist for the drug court] hearsay whether it's for the reason counsel pointed out in her objection, or firsthand knowledge, or because of this recusal motion, but I want the firsthand knowledge witness as to that one of the twenty-four or twenty-five however you count allegations, and I'd direct that person to be present.

Judge Maloney addressed concerns about e-mails that he might have seen about Conner's involvement in the drug court program, but noted that they would not impact his ability to be impartial at the violation of probation hearing:

> I do not know that person. It's again, secondhand statements. I would have to read these e-mails again. To be honest, I hadn't seen them since July. I most likely did read them, or I had my secretary count for the month of October how many Drug Court e-mails there are. She had 190. That does not include individual ones I have with just attorneys about matters, or just with the case manager, just with fellow judges, or some combination thereof, and I can't remember really many with treatment. It's just not the nature of Drug Court that I e-mail his treatment, with one exception I ask for information about graduation, if they have anything I should say about them when somebody's graduating, but, otherwise, it's just not the nature of how Drug Court works that the Court contacts treatment.
>
> Again, as I've already said for the record, I didn't remember these e-mails. This motion is what made me remember it. The only concerning part about a treatment provider saying the name of the witness whose name I can't remember, what's the name? . . . . Mr. Correa is the best. I don't know what that means how you're the best urine collector, but I don't think that goes to credibility.
>
> And, likewise, again, this Court often has probation agents that the Court's worked with for 15 or 20 years. As to this one allegation of the twenty-four allegations, I'll be hearing from a witness I've never seen before,

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> problem-solving court program, the judge should be sensitive to any exposure to ex parte communications or inadmissible information that the judge may have received while the participant was in the program.

Rule 16-207(f), *Committee Note*. It is important to note, however, that not only was Judge Maloney sensitive to the caution contained in the Committee Note but the Note implicates only post-termination proceedings involving a former drug court participant.

> and I can equally judge the credibility of this witness, I believe, and Mr. Conner as to that one of twenty-four allegations.

Judge Maloney further explained that to require a Drug Court Judge to recuse from every hearing involving a sanction for a participant's violation of the drug court program would create "complete havoc":

> And the Court is also cognizant of its duty to recuse itself when appropriate. And there's another judicial canon that says the Court should not recuse itself, and do what cases are assigned to it when recusal is not appropriate. Now, where that falls in, but it's a window the Court has the dual obligations, and I think this falls into the case assigned to me that I should do. And I think I've pointed out in our colloquy that I've been concerned about the complete havoc that if it has to be done in this case what would happen on every sanction hearing, which are countless throughout the years.
>
> We have 80 plus or minus 10, because people are always coming in and out of Drug Court participants, and their sanction hearing weekly, and violations often, though I'm not going to put a number on it, and to have to send those out to other judges, and then to come back, I don't know how that would possibly work to be honest with you.
>
> The whole point about sanctions and, as the Carnes case,[10] the reason I'm making that is because the Carnes case makes it sound like sanctions are mini-violations, or another form of violation of probation that would hurt the treatment modality of immediate sanctions, which help in the addressing of addition as every treatment of this disease have pointed to.
>
> And the whole nature of Drug Court is about - - well, there's many aspects to it. I'll tell you the one that applied to me when I was doing training for that they taught us that people that graduate, and successfully go through it, the relationship with the judges one of the greatest things that helped them graduate, and my thinking, as well, on that. That's how I can use this job that I have for greater good, and help people with this awful addiction. I can't think of a better use of this job that I have.
>
> And I point that out, because we have to - - the judge would lose that ability if we have to have recusal at every time there is any sanction, again, there's a carrot and a stick often in Drug Court. We do encouragement, and it is done informally; you can't get around that. We talk amongst each other, we try to build a relationship with people, and I've had conversations, if we look back, with Mr. Conner I can guarantee. Sometimes these conversations

[10] *State v. Brookman & Carnes*, 460 Md. 291 (2018).

> take every form, but, at the end of the day is try to encourage them to be upfront and honest with their disease, and to embrace change, and to change their drug habits, criminal habits into productive, healthy lives.

Judge Maloney also recognized, however, that circumstances could exist in other cases where it would be "appropriate" for a Drug Court Judge to recuse, but that Conner's case was not one of them, as he only had allegations of violations before him, about which he would receive evidence at the probation revocation hearing:

> We'll be graduating 10 people next Wednesday who have done that. And we're hoping Mr. Conner will be one of those people. Again, I don't know what the future holds down the road anytime, but I just don't find – there will be cases I think when recusal would be appropriate in Drug Court. I just don't think this is that case, because I don't think the allegations and the facts disputed, again, I don't know what I'm going to hear, but it sounds like two different people, two different versions, and it might just be nothing with other allegations that are already addressed. And that's an interesting double jeopardy argument. Again, that's not in front of me today. So, I'll deny the motion to recuse at this point.

At the hearing that ensued, three witnesses testified: Jocelyn O'Rourke, a Drug Court Case Manager who had monitored Conner's compliance with the program's requirements; Larry Stewart, the Manager of the Drug Court Treatment Program for Montgomery County; and Minor Correa Cardinal, a Community Service Aid with the Montgomery County Department of Health, who managed the Drug Court's urinalysis testing. The State also introduced urinalysis-test results and Conner's "Drug Court Case Management Summary," which detailed instances in which Conner had failed to adhere to the conditions of his probation. Judge Maloney then determined that, Conner, based upon the testimonial and documentary evidence introduced, had violated the conditions of his

probation and sentenced him to a total of ten years' imprisonment based upon his previous guilty pleas, but gave him credit of 477 days for time served.

"It is well settled in Maryland that fundamental to a defendant's right to a fair trial is an impartial and disinterested judge." *Jefferson-El v. State*, 330 Md. 99, 105 (1993) (citations omitted). "A fair and impartial trial is a judicial process by which a court hears before it decides; by which it conducts a dispassionate inquiry and renders judgment only after receiving evidence." *Id.* at 106 (quoting *Spence v. State*, 296 Md. 416, 423 (1983)). There are times, however, when, "to protect the defendant and the public's right to a fair trial, and to ensure that the trial judge's impartiality cannot reasonably be questioned, the judge must remove himself from sitting as the trier of fact." *Smith v. State*, 64 Md. App. 625, 633 (1985) (citations omitted). Although the "full sweep of constitutional due process does not extend to probation revocation hearings, part of the process that is due in these proceedings is the right to an impartial tribunal." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L.Ed.2d 484 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759, 36 L.Ed.2d 656 (1973)).

In considering the circumstances in which recusal may be warranted, the Court of Appeals has referred to Canon 3C of the Maryland Code of Judicial Conduct, previously codified as Maryland Rule 1231,[11] but currently numbered as Rule 18-102.11. *See Boyd*

[11] In 1990, when *Boyd v. State*, 321 Md. 69 (1990) was decided, the predecessor to Rule 18-102.11 provided, in pertinent part:

> (1) A judge should not participate in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to
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> (continued . . .)

v. State, 321 Md. 69 (1990). Rule 18-102.11, which Conner argues required Judge Maloney's recusal, now provides in part:

> (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:
> (1) The judge has a personal bias of prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding.

The Court of Appeals has interpreted the Rule so as to not "require a trial judge, who has presided over a prior case, involving the same defendant or incident, automatically to recuse him or herself from presiding over a subsequent trial involving the defendant." *Jefferson-El*, 330 Md. at 106–07 (citations omitted). "This is so because there is a strong presumption in Maryland . . . and elsewhere, . . . that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Id.* at 107 (citations omitted). A judge's decision

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> instances where:
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

Maryland Rule 1231, Canon 3C of Maryland Code of Judicial Conduct. The Rule has been renumbered and amended a number of times since 1990 with its las amendment occurring in 2017. Rules Order (June 20, 2017); Rules Committee, One Hundred Ninety-Three Report at 57 (Apr. 17, 2017), https://mdcourts.gov/sites/default/files/rules/reports/193rdreport.pdf [*archived at* https://perma.cc/J27N-L67E]. Its present essence is the same as that described in *Boyd*.

regarding recusal, therefore, is discretionary and "the exercise of that discretion will not be overturned except for abuse." *Id.* (citations omitted).

"To overcome the presumption of impartiality, the party requesting recusal must prove that the trial judge has 'a personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings." *Id.* (quoting *Boyd*, 321 Md. at 80). Only "bias, prejudice, or knowledge derived from an extrajudicial source is 'personal.'" *Id.* (citations omitted). Conversely, where "knowledge is acquired in a judicial setting, or an opinion arguably expressing bias is formed on the basis of information 'acquired from evidence presented in the course of judicial proceedings before him,' neither that knowledge nor that opinion qualifies as 'personal.'" *Id.* (quoting *Boyd*, 321 Md. at 77). The Court of Appeals has made it clear that, in the context of a request for a judge to recuse:

> the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts*. . . . Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

Boyd, 321 Md. at 86 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102, 109 S. Ct. 2458, 104 L.Ed.2d 1012 (1989)) (emphasis in original).

Against that backdrop, Conner contends that it was error for Judge Maloney, who had participated in various aspects of his drug court participation, to then rule on the allegations of his violating his probation. He posits that Judge Maloney erroneously relied

on personal knowledge of facts he gained from drug court team meetings and that the judge erroneously considered his admissions of drug-use relapses made as part of the treatment process. Accordingly, Conner argues, when a judge who supervises drug court proceedings presides over a violation of probation proceeding involving a drug court participant an appearance of impropriety is created that has a "chilling effect of collaboration and candor necessary for drug court to succeed."

The State, conversely, argues that Judge Maloney appropriately exercised his discretion in denying Conner's motion for recusal because he relied only on the evidence adduced at the hearing and not on any personal knowledge he may have garnered as a drug court judge. The State posits that a probationer, like Conner, who participates in drug court does so voluntarily and with the understanding that team meetings, which include judges, would occur during the course of the program to discuss the probationer's progress.

Judge Maloney, in addressing the issue regarding whether his partiality was impugned by his being part of the drug court team, established a process by which he would evaluate the allegations in the petition to revoke Conner's probation. He specifically required "firsthand knowledge" witnesses to testify regarding the petition as well as documentary evidence, which resulted in his findings and determinations being based on the evidence adduced at the hearing. He appropriately denied the recusal motion based upon the test set forth in *Boyd*, *supra*, 321 Md. 69.

Conner, nevertheless, relies on *Smith*, *supra*, 64 Md. App. 625 and *Wiseman v. State*, 72 Md. App. 605 (1987), cases in which we concluded that a judge presiding over revocation probation hearings should have recused himself. Those cases are inapposite.

In *Smith*, *supra*, 64 Md. App. 625, at a probation revocation hearing in which the State alleged that Smith had violated the terms of her probation by failing to report to her probation officer on multiple occasions, the hearing judge had instructed his law clerk to call medical providers to determine if Smith was truthful about her health care excuses. The law clerk's investigation revealed that Smith had lied about seeing her physician and the judge revoked her probation and sentenced her to imprisonment. *Id.* at 629–30. On appeal, we reversed and concluded that, the judge, by acting as an investigator, denied Smith "the right to have her guilt or innocence of probation violation decided by an impartial tribunal." *Id.* at 632. In *Wiseman*, *supra*, 72 Md. App. 605, we also held that the hearing judge had "no business conducting or participating in any kind of independent investigation into the facts that" he would "ultimately have to determine" at a probation revocation hearing, where he called the defendant's employer to verify her defense to allegations that she had violated the terms of her probation. *Id.* at 609.

Conner also relies for recusal on the National Drug Court Institute's drug court "bench book," which states in part:

> Due process requires that a judge possess neither actual nor apparent bias in favor of or against a party. The standard for determining the appearance of bias or partiality is an objective one. Usually the basis of recusal is due to partiality or bias acquired outside the context of the proceedings—or from an "extrajudicial source."
>
> Additionally, a judge should recuse where the court has personal knowledge of disputed facts.
>
> Judges sitting in drug court often have substantial information about drug court participants—some of which was gained through on-the-record colloquies and pleadings, as well as informal staffings with defense counsel, the prosecutor, the treatment provider, and probation. The Oklahoma

> Supreme Court[12] recognized the potential for accusations of bias against a drug court judge for information obtained in the court's supervisory role and recommended an alternate judge handle termination proceedings:
>
> > However, we recognize the potential for bias to exist in a situation where a judge, assigned as part of the drug court team, is then presented with an application to revoke a participant from drug court. Requiring the district court to act as drug court team member, evaluator, monitor, and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a drug court participant's program.
> >
> > Therefore, in the future, if an application to terminate a drug court participant is filed and the defendant objects to the drug court team judge hearing the matter by filing a motion to recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the drug court program should be assigned to another judge for resolution.

NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK, §8.6, at p. 168 (2001) (footnotes omitted), *available at* https://www.ndci.org/wp-content/uploads/2016/05/Judicial-Benchbook-2017-Update.pdf [*archived at* https://perma.cc/9EG9-J4NC]. The author of the section of the Bench Book which discusses recusal, however, recognized that due process does not require recusal of a drug

[12] The case referenced by the authors of The Drug Court Judicial Handbook, *Alexander v. State*, 48 P.3d 110 (Okla. Crim. App. 2002), is a case from the Court of Criminal Appeals of Oklahoma, and is also relied upon by Conner. In *Alexander*, the issue of recusal was not preserved for appellate review because, Alexander, a drug court participant, never requested recusal at the termination hearing. The Oklahoma Court recommended, in an advisory capacity, that recusal should be considered, but is not required. *Id.* at 115.

court judge when a participant faces termination or probation revocation, but recommended that recusal "should" be the choice:

> Recent decisions have held that a drug court judge does not violate the defendant's due process rights by presiding over the termination or the revocation hearing.[13] Although not necessarily required, the author [of this chapter of the Bench Book] recommends that the drug court judge give the defendant the opportunity to recuse the judge, and the drug court judge *should* not be the judge conducting termination or probation revocation hearings, unless the participant and defense counsel specifically consent in writing to the judge hearing such matters.

Id. (emphasis added) (footnotes omitted). Clearly, in the present case, Judge Maloney carefully considered the "should" of recusal and determined that "firsthand" evidence must be adduced, which it was.

Conner, however, also cites *State v. Cleary*, 882 N.W.2d 899 (Minn. Ct. App. 2016), a case in which the Minnesota Court of Appeals, its intermediate appellate court, held that recusal of a drug court judge presiding over Cleary's probation revocation hearing was

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[13] In *State v. Belyea*, 999 A.2d 1080 (N.H. 2010), the New Hampshire Supreme Court held that the hearing judge did not err in denying Belyea's motion for recusal from a hearing to determine whether he should be terminated from a drug court program, because, under those circumstances:

> the presiding judge on the [drug court] team . . . learned information about the defendant's compliant and noncompliant behavior in the context of the weekly review meetings and in the presence of the entire team, and retained the authority to decide and impose any sanctions that may be appropriate for a participant's misconduct . . . . an objective, disinterested observer, fully informed of the process and goals of the Program would [not] entertain significant concern about whether [the judge] gained personal knowledge about the defendant in a manner that would affect his impartiality and his ability to justly decide a termination issue.

See also State v. Rogers, 170 P.3d 881, 886 (Idaho 2007); *State v. Tatlow*, 290 P.3d 228, 234 (Ariz. App. Div. 1 2012).

required where the basis of the revocation was his termination from drug court; the termination, however, had been decided by the drug court team, including the drug court judge, rather than evidence adduced at the contested probation revocation hearing. There, the intermediate appellate court noted that the drug court judge, "was not the sole decision-maker regarding the termination decision, but was one member of the drug court team which 'share[s] a common vision and goals and . . . agree[s] to share resources, authority and responsibility for the team actions.'" *Id.* at 906. The court also noted that it was difficult to determine the drug court judge's impartiality because Cleary had "exchanged a journal with the drug court judge at his weekly drug court appearances[,]" in which "he was encouraged to share his feelings and to openly discuss his struggles and achievements in his personal life with the judge[,]" and the drug court judge "was the only team member to read the contents of [Cleary's] journal." *Id.* at 905. The Minnesota court also found that, after reviewing the judge's statements to Cleary at the drug court termination hearing, at which the judge stated Cleary's termination was a decision of the team, "an objective observer could reasonably conclude that the presiding drug court judge could not then 'maintain an open mind' while making the requisite findings at the probation revocation hearing." *Id.* at 907.

Cleary is inapposite from the instant matter as Judge Maloney's findings and determination regarding Conner's violations of probation were based on evidence adduced at the hearing.

Conner next argues that Judge Maloney erred when he denied his motion to dismiss various allegations in the violation of probation petition based on double jeopardy, res

judicata, and collateral estoppel.[14] He asserts, as he did below, that because some of the same conduct alleged in the petition had already been subject to adjudication and sanctions in drug court, he alleges that "[r]evoking probation and executing a suspended sentence based on such conduct risks running afoul of double jeopardy."

The Double Jeopardy Clause, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., Amend. V. The Double Jeopardy Clause:

> prohibits three distinct abuses: 1) the second prosecution for the same offense after acquittal; 2) the second prosecution for the same offense after conviction for that offense; and 3) the imposition of multiple punishments for the same offense.

Taylor v. State, 381 Md. 602, 610 (2004).

Before us, Conner argues that he was twice punished for the same violations. While a participant in drug court, he was sanctioned, including periods of incarceration, for using drugs, providing diluted (low creatinine) urine samples, missing a recovery meeting, and failing to contact a case manager. Conner, then, posits that he was subject to "multiple punishments" for the same conduct when his probation was revoked and he received an executed prison sentence.

[14] Conner frames his second question to include res judicata and collateral estoppel, but does not explore how those concepts were implicated, either before Judge Maloney or before us. We, therefore, conclude that such arguments are not properly preserved and address the double jeopardy argument.

The issue raised by Conner is resolved by the tenets of Rule 16-207(g). The Rule provides that "[i]f a participant is terminated from a [problem-solving court] program, any period of time during which the participant was incarcerated as a sanction during participation in the program shall be credited against any sentence imposed or directed to be executed in the action." Here, Conner did not receive multiple punishments for the same conduct. At the sentencing phase of his probation revocation hearing, Judge Maloney credited him with 477 days in jail for prior sanctions pursuant to the Rule, acknowledging that he was required to do so.

Conner, nonetheless, posits that "[t]here are also strong policy and due process reasons to discourage Circuit Court judges from sanctioning drug court participants in the drug court setting and then using the same conduct that led to those sanctions as the basis for revoking their probation." He contends that, "[i]f a defendant's mistakes, admitted during drug court, can then be used to revoke his probation, all his participation in drug court will have achieved is to waive his right to meaningfully contest his alleged violations of probation[,]" which, he further posits, would negatively impact the therapeutic nature of the drug court program.

Conner did not raise these issues before Judge Maloney and so did not preserve them. Nevertheless, Conner's arguments lack merit, based upon his voluntary and knowing agreement to the Drug Court terms, which recognized the importance of graduated sanctions leading up to and including termination from the program and from probation.

For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Circuit Court for Montgomery County
Case Nos.: 128191C, 129945C, 129948C,
129949C, & 130210C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 134

September Term, 2019

EFFREM ANTOINE CONNER

v.

STATE OF MARYLAND

Meredith,
Friedman,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Friedman, J.

Filed: June 26, 2020

I, respectfully, dissent in part.[1] I believe the court failed to consider whether its "impartiality might reasonably be questioned" due to "personal knowledge of facts that are in dispute." MD. RULE 18-102.11. As a result, I would hold that the trial court abused its discretion and would reverse and remand for a full consideration of the grounds for disqualification.

Drug court modifies the traditional judicial role. As my colleagues in the majority note, the drug court program is "team-based 'rather than an adversarial process,'" with the judge referred to and acting as a "team leader." Slip op. at 2 (quoting *State v. Brookman*, 460 Md. 291, 301 (2018)). As a "team leader," it is fine for a judge to review ex parte and inadmissible evidence. At a termination or revocation of probation hearing, however, the trial judge returns to the traditional role as an "impartial participant." Slip op. at 13 (quoting *Jefferson-El v. State*, 330 Md. 99, 107 (1993)). In that traditional role, of course, the judge should not have access to—or have *had* access to—personal knowledge of facts that are in dispute, specifically, ex parte information and inadmissible evidence. Thus, it is the change in the judge's role that requires heightened sensitivity to the recusal standards.

The Committee Note to Rule 16-207(f) states:

> In considering whether a judge should be disqualified pursuant to Rule 18-102.11 of the Maryland Code of Judicial Conduct

[1] As will be obvious momentarily, I think that the trial judge failed to properly consider Conner's motion for disqualification. Thus, my preferred outcome would be to remand the case for a new hearing on the motion for disqualification. After that hearing, it would be appropriate for the judge (either new or old) to pick up the proceedings from there. Thus, if I had my druthers, we would not need to address Conner's motion to dismiss. As the majority has resolved the disqualification issue the other way, however, it is necessary to address the propriety of the denial of Conner's motion to dismiss. About that, I join the majority's opinion.

> from post-termination proceedings involving a participant who has been terminated from a problem-solving court program,[2] the judge should be sensitive to any exposure to ex parte communications or inadmissible information that the judge may have received while the participant was in the program.

Committee Note to Rule 16-207(f).

The National Drug Institute's Drug Court "Bench Book" also thinks recusal is a good idea when the judicial role changes, even if it stops short of saying that recusal is mandatory:

> Although not necessarily required, the author [of this chapter of the Bench Book] recommends that the drug court judge give the defendant the opportunity to recuse the judge, and the drug court judge *should* not be the judge conducting termination or probation revocation hearings, unless the participant and defense counsel specifically consent in writing to the judge hearing such matters.

Slip op. at 16-18 (emphasis added). Judges should not decide whether to terminate an individual from the drug court program or revoke their probation if they have received ex parte or inadmissible information from the drug court program. That's the fundamental point of the *Cleary* case. Slip op. at 18-19 (discussing *State v. Cleary*, 882 N.W.2d 899 (Minn. Ct. App. 2016)). And that's the fundamental point of the *Alexander* case. Slip op.

[2] My colleagues note that Conner's hearing was not a post-termination proceeding and suggest that the heightened caution contained in the Committee Note doesn't apply. Slip op. at 8-9 n.9. I disagree. I understand the Rules Committee to have been concerned about the change in the judicial role. Moreover, even if the Committee Note doesn't technically apply in this situation, Rule 18-102.11, which prohibits a judge from hearing a case in which the judge possesses information that would otherwise be ex parte or inadmissible, certainly does.

at 17 n.12 (discussing *Alexander v. State*, 48 P.3d 110 (Okla. Crim. App. 2002)). As Professor Timothy Casey described it:

> When the defendant enters the "treatment" phase of the problem-solving court, procedural protections should be relaxed and the collaborative approach followed. But at the point when treatment is deemed to have failed, and the alternative punishment sought to be imposed, then procedural protections should apply and an adversarial model followed. *Moreover, the termination or revocation process should occur in a different court with a different judge*. To put it simply, the same judge should not play good cop and then play bad cop.

Timothy Casey, *When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1514-15 (2004) (emphasis added); Richard C. Boldt, *The "Tomahawk" and the "Healing Balm:" Drug Treatment Courts in Theory and Practice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS, 45, 69-70 (2010).

The judge here didn't consider whether he had received ex parte communications or inadmissible information about Conner, but instead focused on three, largely if not wholly, irrelevant concerns. *First*, the judge talked about administrative problems that would be caused by recusal. Slip op. at 10 ("I don't know how that would possibly work to be honest with you."). I don't know how big of an administrative problem this would create but it surely isn't Conner's problem or a valid reason for denying Conner's request for a recusal. *Second*, the trial judge confused the procedural posture of Conner's case and worried that granting a recusal for *every* sanction would interfere with the "carrot and stick" approach of drug court. Slip op. at 10. Conner wasn't there for an intermediate sanction. He was there for a probation revocation hearing. There would be no more carrots and no

more sticks for him. And *third*, the judge said that because there would be an evidentiary hearing at which he could fairly evaluate "the allegations and the facts disputed," slip op. at 11, he need not recuse himself. This misses the boat too. The important part of the probation revocation hearing wasn't the factual question of whether Conner violated the conditions of drug court (I assume he had), but whether to give him another chance and retain him in the drug court program or, if not, to what term of incarceration he should be sentenced. As to those questions, anything the trial judge knew about Conner would have been gleaned from his drug court participation (including ex parte and otherwise inadmissible information), not from an adversarial process (as Conner, like all drug court participants, pleaded guilty). The trial judge therefore considered and discussed three irrelevant points, but failed to consider the critical point: whether his "impartiality might reasonably be questioned" due to "personal knowledge of facts that are in dispute." MD. RULE 18-102.11.[3]

As such, the trial court abused its discretion. I would remand for reconsideration under the proper standard. On remand, as I envision it, the judge would apply the ordinary Rule 18-102.11 test for disqualification. He would also give special focus to whether he

[3] The trial judge did mention, without apparent irony, that he "would have to [re-]read" the emails that he had received about defendant, slip op. at 9, apparently to reacquaint himself with the ex parte and otherwise inadmissible information about Conner that he had previously received but now "didn't remember." *Id*. I must say that I am not sure precisely how this helps. *First*, the relevant question isn't whether the judge has actual, current knowledge of information gleaned from ex parte and otherwise inadmissible sources, but rather whether, given that he at one time possessed such information, would a reasonable observer reasonably question the judge's impartiality. Thus, his forgetfulness, isn't dispositive. And, *second*, reviewing the emails makes it worse, not better.

had obtained ex parte or inadmissible information about the defendant (whether he remembers the specific content or not).[4]

[4] Moreover, when the trial judge considers whether to disqualify himself, he might also give a thought to future participants in the drug court whose willingness to participate in the therapeutic relationship might be compromised should they conclude that anything they share during that relationship may be part of the material considered if they fail.