UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0270

September Term, 2015

RICHARD ROYDEN McCLEARY

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 30, 2015

In this case, appellant Richard Royden McCleary claims that the sentencing judge in the Circuit Court for Worcester County abused his discretion in refusing to recuse himself based upon the appearance of partiality. He appeals from the sentencing judge's denial of his motion to recuse. We find no abuse of discretion and shall affirm.

I.

In February, 2006, appellant was convicted of two counts of possession of cocaine with intent to distribute and two counts of possession of cocaine. The court imposed a term of incarceration of twenty years on each of the possession with intent to distribute charges. On direct appeal, in an unreported opinion, this Court affirmed. *McCleary v. State*, No. 2858, Sept. Term, 2005 (June 11, 2008). In March, 2010, the State filed a motion to correct appellant's commitment record, arguing that as a subsequent offender, he was subject to ten years without parole. The trial court agreed with the State, and placed a "parole eligibility restriction of 10 years" on each sentence. Appellant believed that sentence was illegal and he filed a motion to correct. The trial court denied his motion, a three judge panel declined to revise his sentence, and he appealed. This Court agreed with appellant, holding that the circuit court improperly imposed two subsequent offender enhanced sentences. We vacated the sentence and remanded for resentencing. *McCleary v. State*, No. 1608, Sept. Term, 2013 (December 15, 2014).

Before the resentencing proceeding, appellant filed a motion requesting the sentencing judge recuse himself from the proceedings. Appellant argued the following historical grounds for recusal:

> The trial court summarily denied, without a hearing, appellant's motion for evaluation for long term treatment pursuant to the Health General Article, even though the State did not oppose the motion.
> - The trial court denied summarily appellant's motion to correct the commitment record regarding the illegal double enhancement, without a hearing or written opinion.
> - The trial court denied appellant's motion to correct an illegal sentence without a hearing.
> - The trial court had knowledge of the case, beyond the issue of resentencing. Appellant alleged that the trial court had authorized two search warrants, sworn to by Trooper Kondon and that appellant had reason to believe that the Trooper made misstatements of fact in those search warrants concerning appellant, which prejudiced the trial court against appellant.

The trial court denied the motion to recuse. The judge denied any bias or prejudice against appellant and affirmatively stated that he had no specific recollection of appellant outside of the particular case. The court explained as follows:

> "Well, the defense recites in its support for its motion for recusal that this Court declined without a hearing the defendant's motion for an evaluation for treatment under the Health General Article. This Court denied without a hearing a motion to correct a commitment record and a motion to correct an illegal sentence. The last motion was the subject of the opinion of the Court of Special Appeals.
>
> The defendant also says that this Court—that he filed a *pro se* motion for access to crucial legal documents held at the

Division of Corrections and this motion's not been ruled upon in a timely fashion. He says this Court has knowledge of the case beyond the issue of resentencing as this Court has authorized two search warrants sworn to by a trooper of the Maryland State Police. The defendant believes that that trooper made misstatements of fact in connection with those.

First of all, the *pro se* motion that was filed by the defendant to have access to certain documents that were at the Division of Corrections was in fact a *pro se* motion filed by the defendant after the Office of the Public Defender had entered its appearance in this case. That motion has been denied by this Court inasmuch as only motions made by attorneys—motions can only be made by attorneys who are representing people in a case. You can't have a lawyer and then file motions yourself and expect the Court to rule on those motions. So just to clear up that part of it.

My contact with Mr. McCleary, just to make it clear for the record, insofar as I can recall consists of the following which are not addressed in this motion.

Probably about 20 years ago when I was on the District Court, when I was cross assigned to the Circuit Court, I ruled on—held a hearing on and wrote an opinion in a post conviction case in which Mr. McCleary was the defendant if my memory serves me correctly.

In addition to that, when I was on the Circuit Court—since I've been on the Circuit Court, I want to say that about the same time that Mr. McCleary was found guilty in connection with this case and sentenced, he was charged with an alcohol-related driving offense. And I have a memory that I may have presided over a plea hearing in connection with that alcohol-related driving offense.

> Apart from that and apart from considering and ruling on the motions to which Mr. McCleary's counsel refers, I have had no contact with Mr. McCleary. I don't know him. I have no specific recollection of signing warrants in connection with any of his cases. But in the 15 years I was on the District Court, I would estimate that I signed hundreds of warrants, and I suppose it's not surprising that I would not recollect any particular motion—or search warrant in his cases if I did sign such warrants.
>
> In terms of knowledge in this case, my—this case was presided over by Judge Wise. My knowledge of this case is limited to my review of the case file and the docket entries, first of all, to decide whether it was appropriate or necessary to hold a hearing on any of the motions that were filed in the case. And finding that hearings were not necessary, to gather the information that the Court believed necessary from the file to rule on those motions.
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> On the issue of recusal, no reasonable person knowing all the facts and circumstances would conclude that this Court has a bias or prejudice against Mr. McCleary or that its impartiality in this matter could be reasonably questioned. The motion for recusal is denied."

Finding no actual bias or prejudice, or appearance of impropriety, the court denied the motion. This appeal followed.

II.

Before this Court, appellant argues that the circuit court abused its discretion by refusing to grant appellant's recusal motion. He asserts that the trial judge should not have presided over appellant's resentencing because the judge's history of denying his motions,

and the incorrect information the judge had heard about his case in the search warrant applications gave the appearance of impropriety.

The State argues that the trial judge did not abuse his discretion in refusing to recuse himself. The State points out that appellant does not allege actual bias and that there exists no evidence of bias or appearance of such. Appellant, in the State's view, has not satisfied the high burden to establish that the sentencing judge was biased, impartial or disinterested.

III.

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). Every defendant has a right to a trial in which not only is the judge impartial and disinterested, but who has the appearance of impartiality. *Scott v. State*, 110 Md. App. 464, 486 (1996). Notwithstanding the above bedrock principle, a trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption. *Karanikas v. Cartwright*, 209 Md. App. 571, 579 (quoting *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297 (2003)); *Jefferson-El*, 330 Md. at 107.

A trial court's ruling on a motion for recusal is reviewed for abuse of discretion. *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990). A judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be

questioned. Maryland Rule 16-813, Maryland Code of Judicial Conduct, Rule 2.11. Disqualification, provides, in pertinent part, as follows:

> "(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."

A similar rule applies for judicial appointees under Maryland Rule 16-814, Maryland Code of Judicial Conduct, Rule 2.11:

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

Not only actual bias or prejudice requires recusal. The appearance of impropriety can require disqualification. As the United States Supreme Court suggests, many states, including Maryland, have undertaken judicial reforms to eliminate the appearance of partiality:

> "Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.' ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004); see Brief for American Bar Association as *Amicus Curiae* 14, and n. 29. The ABA Model Code's test for appearance of impropriety is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same)."

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 888 (2009). Maryland Rule 16-813, Maryland Code of Judicial Conduct, Rule 1.2. Promoting Confidence in the Judiciary, reflects the ABA Model Code of Judicial Conduct:

> "(a) A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
>
> (b) A judge shall avoid conduct that would create in reasonable minds a perception of impropriety."

A judge should recuse if "the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *People v Aceval*, 781 N.W.2d 779 (Mich. 2010) (quoting *Caperton*, 556 U.S. at 888). In applying this rule, the reasonableness standard is an objective one. *Caperton*, 556 U.S. at 883; *Scott v. State*, 110 Md. App. 464, 487 (1996) (noting "[a]ppearance of disinterestedness or impartiality is determined 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.' [*Jefferson-El*, 330 Md. at 108]"). The burden rests with the party urging disqualification or recusal to show that it is warranted. *Scott*, 110 Md. App. at 486.

When the basis for the recusal motion is not based upon constitutional or legal disqualification grounds, the matter is left to the sense of fairness of the particular judge, with

the trial judge enjoying a broad range of discretion. *Boyd v. State*, 321 Md. 69 (1990). As Judge John F. McAuliffe explained in *Boyd*:

> "There may be, and doubtless are, many circumstances in which a delicate sense of propriety would, and probably should, induce a judge to decline to sit in a given case and, upon his own motion or upon motion of either of the parties, remove the cause to another jurisdiction or request some other judge of the same jurisdiction to preside at the trial. However, if the presiding judge, under such circumstances, refuses to do this, he is within his legal rights; and his action in that respect is not the subject of review. Where the alleged disqualification does not amount to a constitutional or legal disqualification, the question is left to the enlightened conscience, delicacy of feeling, and sense of fairness possessed by the individual judge. The long and honorable history of the judiciary of this state impels the belief that the decision of such questions can be safely left where the responsibility now reposes. Judges are selected to be useful public servants, and no judge's view of the proprieties in such questions should be carried to such an extent as would result in the serious curtailment of his usefulness as a public officer. *Ex Parte Bowles*, 164 Md. 318, 326, 165 A. 169 (1933)."

Id. at 74-75.

Courts have distinguished between facts which come to a judge's attention during the course of a trial or proceedings, and information which comes to the judges attention from sources outside of the case. 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.* at 75. Only bias, prejudice, or knowledge derived from an extrajudicial source is "personal." 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.* at 77 (quoting *Craven v. United States*, 22 F.2d 605, 607-08 (1st Cir. 1927)); *Doering v. Fader*, 316 Md. 351, 356 (1989).

One federal case referred to this "personal" requirement as the "four corners of the courtroom." *Tynan v. United States*, 376 F.2d 761, 765, 126 U.S.App.D.C. 206 (D.C. Cir. 1967); *In Matter of Evans*, 411 A.2d 984, 995 (D.C.App. 1980). The court explained the "'four corners of the courtroom' test as an alternative formulation of the rule that bias must be personal rather than judicial before recusal will be required." *In Matter of Evans*, 411 A.2d at 995. The United States Supreme Court explained that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Knowledge the judge acquires in a judicial setting or proceeding does not qualify as "personal." *Boyd*, 321 Md. at 77.

In *Doering*, 316 Md. 351, a capital punishment case, the Court of Appeals held that the trial judge was not disqualified from hearing a sentencing proceeding merely because he had presided at an earlier trial and sentencing proceeding in the same case, and he had indicated that he had formed and had expressed an opinion concerning the propriety of a death sentence under the circumstances of that case. We distinguish between personally

acquired information and judicial information. We quoted from *Grinnell Corp.*, addressing the source of information a trial judge receives and the impact it has upon a recusal decision—"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Although there are times when disqualification is necessary or appropriate to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Maryland Code of Judicial Conduct Rule 16-813, section 2, Rule 2.7, Comment. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues. *Id.*

We hold that the sentencing judge did not abuse his discretion in denying appellant's motion to disqualify or recuse. Appellant has not presented any basis requiring or suggesting that the judge should have recused himself. We are fortunate in this case to have detailed findings set out by the judge to support his decision to preside over the sentencing proceeding. Appellant has presented no facts or information outside of the judicial proceedings or judicial record to support his argument that the judge had a *personal* bias or prejudice against appellant. Moreover, the judge had no recollection of signing a search

warrant related to appellant. The fact that the Court of Special Appeals vacated appellant's sentence does not support or suggest a personal bias or prejudice. And the judge's denial of a treatment evaluation without a hearing or motions to correct an illegal sentence without a hearing, by themselves, do not indicate bias. Judges deny motions without hearings every day. Such rulings do not indicate bias or prejudice.

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