

JUN 30 2000

JAMES W. PATTERSON  
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL WEST,

Petitioner,

v.

THE HONORABLE SUSAN P. CASWELL,  
DISTRICT JUDGE, OKLAHOMA COUNTY,

Respondent.

No. MA-2000-425

**ORDER LIFTING STAY OF PROCEEDINGS, GRANTING  
APPLICATION FOR A WRIT OF MANDAMUS, AND REMANDING  
MATTER TO THE DISTRICT COURT OF OKLAHOMA COUNTY**

On April 5, 2000, Petitioner, by and through counsel C. Merle Gile, filed an application for writ of mandamus in Case No. CF-1999-172, in the District Court of Oklahoma County, requesting this court to direct the Honorable Susan P. Caswell, District Judge of Oklahoma County, to disqualify herself from presiding at Petitioner's upcoming trial in *State of Oklahoma v. Michael West*. Petitioner states that he is charged in Case No. CF-1999-172 with Child Abuse for allegedly inflicting physical injury upon his infant daughter by shaking her. Petitioner believes that Respondent's career in prosecuting crimes against children, coupled with her promise to continue to fight for victims on the bench, reveals a bias against any defendant accused of any type of injury to a child." Petitioner also believes there is a "continuing appearance of bias" on the part of Respondent that affects his ability to receive a fair trial.

On March 7, 2000, Petitioner filed a written request for Judge Caswell to

disqualify herself from presiding at Petitioner's trial pursuant to Rule 15, *Rules for District Courts of Oklahoma*, Title 12, Ch.2, App.1 (1999). Following a hearing March 22, 2000, Judge Caswell denied the request. On March 27, 2000, as required by Rule 15, Petitioner filed a motion requesting the Chief Judge of Oklahoma County disqualify Judge Caswell and reassign the case to another district judge for trial. Following a hearing March 31, 2000, the Honorable Bryan C. Dixon, Chief Judge, denied Petitioner's request. Petitioner now seeks extraordinary relief arguing that he has a "clear legal right to be tried before a judge who is neither biased, nor gives the appearance of being biased, against him."

In support of Petitioner's application, he sets forth the following grounds for seeking Judge Caswell's disqualification:

Prior to being elected District Judge in 1998, Respondent was an Assistant District Attorney in Oklahoma County. Respondent and Patricia High had been part of the Oklahoma County District Attorney's unit specializing in prosecution of child abuse.

During her judicial campaign, Respondent highlighted this prosecutorial experience, not just to illustrate her experience in the law, but specifically to proclaim her commitment to 'victim rights' while working with child abuse prosecutions. The 'victims' rights' platform ultimately became a highly-publicized issue in the campaign. Respondent's campaign advertisements contrasted the incumbent judge's action in a particular case [wherein the incumbent judge, the Honorable William Burkett, had gained negative media attention for setting a reasonable bond for a man charged with child-abuse murder (shaken-baby)], with Respondent's stance as an advocate for 'victims,' noting that Respondent had 'specialized in the prosecution of sexual and physical assaults on children and adults.' [Petitioner attached a copy of a representative political advertisement.]

More importantly, this campaign literature expressed the promise that Respondent, if elected to the bench, would continue to 'fight' for victims' rights. Because [Petitioner] is charged herein with physically abusing his

infant daughter, he believes it will be impossible for him to receive a fair trial.

On April 14, 2000, this Court issued an order directing Respondent, or her designated representative, to file a response to Petitioner's application. The response, prepared by Patricia High, Assistant District Attorney, was filed in this Court on May 16, 2000.

The State argues that "[d]isqualification of a judge lies within the discretion of the trial court and should occur only when there is a personal relationship between the defendant or judge or where the judge shows actual prejudice against the defendant." In this case the State asserts that Judge Caswell has neither a personal relationship with Petitioner, nor has she acted in any manner prejudicial to Petitioner.

On May 24, 2000, Petitioner filed a reply to Respondent's response. In the reply Petitioner asserts that recusal is not predicated only on a showing of a personal relationship with a party or "actual prejudice;" Respondent's former status as a prosecutor, while not itself grounds for recusal, illustrates bias under the circumstances presented; Respondent's willingness to appear for the State at a clemency hearing bore the appearance of partiality; and, judicial ethics rules are highly relevant to the issues presented.

For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999).

Petitioner asserts that he does not believe he can get a fair trial before this judge. Appellant's brief is accompanied by examples of campaign literature wherein this judge proclaims: "It's time to balance the scales of justice for victims;" "I'll fight for rights of victims;" "I believe justice requires a fair system for all, especially little children who may be too small or unable to speak for themselves;" "Vote for Susan Caswell and Balance the Scales of Justice for Victims."

Judicial Ethics Opinion 98-15, \_\_\_ P.2d \_\_\_, 1998 OK JUD ETH 15, an advisory opinion cited by Appellant, answers the question whether such campaign statements are permitted by the Code of Judicial Conduct. The Advisory Panel determined this type of statement is not permitted, that it "could be interpreted to mean a judicial candidate, if elected, would take a pre-announced approach in deciding cases of a particular class."

Charges were filed in this case the same month that this judge took office - January 1999. Because of the close proximity of the election and the filing of charges in this case, and the campaign rhetoric exuded in this election, we understand Appellant's concerns about getting a fair trial before this judge.

"Every person accused of crimes is entitled to nothing less than the cold neutrality of an impartial judge, and where the circumstances are of such a nature as to cause doubts as to the impartiality of a judge, the error, if any, should be made in favor of the disqualification rather than against it, for the reason that the state has an interest in the standing, integrity, and reputation of its courts." *State ex rel Vahlberg v. Crismore*, 90 Okla.Cr.244, 247, 213 P.2d 293

(1949). Canon 3(E)(1) of the *Code of Judicial Conduct*, directs that a judge “should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” 5 O.S.Supp.1999, ch.1, app.4, Canon 3(E)(1). The test imposed by Canon 3 has been stated as follows:

“Would a person of ordinary prudence in the judge’s position *knowing all of the facts* known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?” The question is not whether the judge was impartial in fact, but whether another person, *knowing all of the circumstances*, might reasonably question the judge’s impartiality - whether there is an appearance of impropriety.

*Ex parte Sanders*, 659 So.2d 1036, 1038 (Ala.Crim.App.1995) (citation omitted) (emphasis added). Or stated another way, “a reasonable person, *knowing all the facts*, [would] conclude that the trial judge’s impartiality could reasonably be questioned.” *United States v. Thompson*, 76 F.3d 442, 451 (2d Cir.1996) (brackets in original) (emphasis added). (See also Canon 2 which directs that a judge should “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and Canon 5 which directs that a judicial candidate should not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”) Our courts must be presided over by unprejudiced, unbiased, impartial and disinterested judges and all doubt and suspicion to the contrary must be jealously guarded against. See *Castleberry v. Jones*, 68 Okla.Cr. 414, 99 P.2d 174, 179 (1940).

The Oklahoma Constitution guarantees a defendant the right to a fair, impartial trial not tainted by any prejudice or personal bias of the trial judge. The decision to recuse is within the discretion of the trial court and the denial of a

recusal motion is reviewed for abuse of discretion. See *Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157; Okla.Const. art. II, § 6. In this case we find an abuse of discretion as the facts demonstrate Judge Caswell's impartiality might reasonably be questioned.

Accordingly, Petitioner's application for writ of mandamus in Case No. CF-1999-172, in the District Court of Oklahoma County, requesting this court direct the Honorable Susan P. Caswell, District Judge of Oklahoma County, to disqualify herself from presiding at Petitioner's upcoming trial in *State of Oklahoma v. Michael West*, is **GRANTED**. The stay of proceedings in Case No. CF-1999-192 imposed by this Court's April 14, 2000, Order, is **LIFTED** and the matter is **REMANDED** to the District Court for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

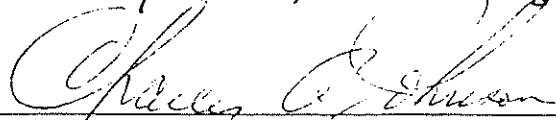
**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this <sup>28</sup>30 day  
of June, 2000.



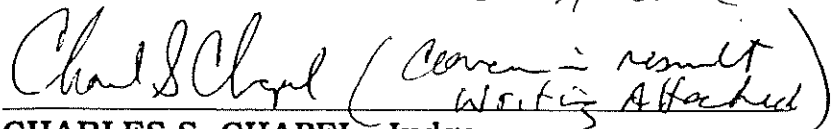
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**RETA M. STRUBHAR, Presiding Judge**



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**GARY L. LUMPKIN, Vice Presiding Judge**



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**CHARLES A. JOHNSON, Judge**



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**CHARLES S. CHAPEL, Judge**

*Steve Lile* *Deputy*  
\_\_\_\_\_  
**STEVE LILE, Judge**

ATTEST:

\_\_\_\_\_  
Clerk

**CHAPEL, J., CONCUR IN RESULT:**

The issue presented to us is whether the Chief Judge of Oklahoma County abused his discretion in denying West's Application to Disqualify Judge Susan Caswell. Clearly, he did, and I therefore join in the Court's order. However, I would go further.

Our legal system is based upon the principle that disputes will be resolved in a trial before a neutral, unbiased arbiter of the facts and law. The question of whether or not Petitioner has met his burden of showing bias on the part of Respondent can only be resolved in the context of the Code of Judicial Conduct, as the Code sets forth the minimum standards for disqualification for bias. In this case we are presented with a person who prior to taking office and during her campaign for the office of District Judge ran advertisements which clearly committed her "with respect to cases, controversies or issues likely to come before [her] court" in a blatant, calculated and knowing violation of the Code of Judicial Conduct. It is unnecessary for us to review the record, after the fact, to determine bias because Caswell publicly promised that, if elected, she would be biased.

The single most compelling factor in my decision in this case, aside from the ad itself, is Judicial Ethics Opinion 98-15, \_\_\_ P.2d \_\_\_, 1998 OK JUD ETH 15. After Caswell ran her ad during the campaign, someone requested an opinion concerning its propriety. The Advisory Panel promptly issued a written opinion declaring the ad to be improper and specifically found that it "could be

interpreted to mean a judicial candidate, if elected would take a preannounced approach in deciding cases...” Caswell’s response was to continue running the ad.

I have always believed that the most important concept in ethics is awareness. The most we can ever hope for is that all lawyers and judges be ethically aware by knowing the Rules and, trying, in good faith, to follow them. I am not nearly as concerned about someone who is aware of a rule and makes a good faith effort to comply with it, even if it turns out he or she has wrongfully interpreted the rule, as I am by someone who violates a rule out of ignorance or deliberately.

Here there can be no doubt. Any argument that Caswell complied with the rules, or was aware of the rules and tried to comply rings hollow in the face of her decision to run the ad after the Ethics Opinion. Caswell deliberately violated the Rules by publicly announcing that she would be biased if elected. She was elected and now, a defendant before her complains of bias. What should we do? The majority very narrowly decides the issue by disqualifying Caswell in this case. As a general rule I agree that cases should be decided as narrowly as possible. However, general rules do not always work for the best. Judge Caswell has promised to be biased generally in criminal cases, not just this one. Anyone tried in her court on criminal charges will surely raise the issue. There is no good reason for us to spend the next several years deciding this issue. To do so risks having to reverse and retry dozens of cases with all the problems and

expenses attendant to retrials. It is this Court's duty to see that persons charged with a crime receive a fair trial before an unbiased judge. I would enter an order disqualifying Respondent from hearing this case and any other criminal case.

## LILE, JUDGE: DISSENTS

Judge Bryan C. Dixon denied this recusal request on March 31, 2000, stating in part:

“There’s no record anytime during her 15 months on the bench now that she’s done anything to lean one way or another in a case that she’s done. I think that’s more relevant to what we have here than anything, not just some ad that was run during the heated campaign she had with Judge Burkett. So I see no reason why she should be recused in this case. The recusal will be denied.” (Tr., p. 13-14).

In *T.R.M. v. State*, 1979 OK CR 59, 596 P.2d 902, this Court stated as follows:

“The constitutional provision guaranteeing every person charged with a crime a trial ‘without prejudice’ does not mean that the trial judge may not have an opinion as to the defendant’s guilt or innocence, or may not be prejudiced against the crime charged, but means that he shall not entertain a personal prejudice against the defendant. *Wininegar v. State*, 97 Okl.Cr. 64, 257 P.2d 526 (1953); Oklahoma Constitution, Art. II, s 6.”

We review the ruling of the Chief Judge for abuse of discretion. *Merritto v. Hunter*, 1978 OK 18, 575 P.2d 623; *C.R.B. v. State*, 1978 OK CR 22, 575 P.2d 636.

Finding no abuse of discretion, I dissent.