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STATE OF NEBRASKA, APPELLEE, V. THUNDER COLLINS, APPELLANT.

812 N.W.2d 285

Filed May 11, 2012. No. S-11-891.

1. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
2. **Criminal Law: Pretrial Procedure: Appeal and Error.** Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Judges: Recusal.** In order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
5. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
6. **Depositions: Proof.** Under Neb. Rev. Stat. § 29-1917 (Reissue 2008), for a defendant to obtain a deposition, the defendant must make a factual showing that the deponent's testimony either (1) may be material or relevant to an issue in the trial or (2) may assist the parties preparing for trial in their respective cases.
7. **Depositions: Statutes: Words and Phrases.** The plain language of Neb. Rev. Stat. § 29-1917 (Reissue 2008), by using the term "may," indicates that the granting of a deposition is within the trial court's discretion. As such, a defendant is not entitled, as a matter of right, to a deposition pursuant to § 29-1917.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Steve Lefler and Kyle C. Hassett, of Lefler & Kuehl Law, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and PIRTLE, Judge.

McCormack, J.

NATURE OF CASE

Thunder Collins was tried and convicted for numerous crimes, including first degree murder. On Collins' first appeal, we remanded the cause for a hearing to determine whether Collins was prejudiced by the jury's weekend separation during its deliberations. At that hearing, Collins moved for the judge's recusal and to conduct discovery. Both motions were denied. Following the hearing, the district court determined that Collins suffered no prejudice from the jury's separation and overruled his motion for new trial. Collins appealed each of those rulings. We conclude that the district court did not abuse its discretion, and we affirm Collins' convictions and sentences.

BACKGROUND

The circumstances surrounding this case are set out in detail in *State v. Collins*[1] and need not be repeated here. Suffice it to say, the record showed that Collins worked with two California-based drug dealers to supply crack cocaine in Omaha, Nebraska. Rather than continue to split the profits, Collins tried to eliminate his partners. While they were all at an Omaha house to prepare the drugs for distribution, Collins shot them both—one survived, and one did not. Collins was apprehended and charged with and convicted of first degree murder, attempted second degree murder, first degree assault, and two counts of use of a weapon to commit a felony. He was sentenced to life in prison plus at least 90 years' imprisonment.[2]

On Collins' first appeal, we concluded that the district court erred in allowing the jury to separate during deliberations without Collins' express consent. We determined that this error resulted in a presumption of prejudice in Collins' favor, but that the State would be given an opportunity to rebut that presumption. We then remanded the cause for an evidentiary hearing on that issue.[3]

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[1] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[2] See *id.*

[3] See *id.*

At the hearing, Collins argued several motions. First, Collins moved the presiding judge to recuse himself from the proceeding. Essentially, Collins argued that it would be difficult for the judge to admit his mistake and follow this court's direction on remand and that therefore, the judge should recuse himself. Collins noted that a judge should avoid even the appearance of impropriety and that a reasonable person, when presented with these circumstances, might question the judge's impartiality. Collins also claimed that the judge's scheduling of the remand hearing on the same day as the hearing on Collins' preliminary motions indicated that the judge had already decided to deny Collins' motions, before ever hearing argument, which demonstrated bias. The judge denied the motion for recusal, explaining that Collins had not offered any evidence of bias or prejudice and that, considering the issue on remand, the judge was in the best position to determine if Collins had been prejudiced by the jury's separation during deliberations.

Second, Collins moved the court to allow Collins to depose each of the jurors who had been subpoenaed to testify at the hearing. Collins argued that each juror's testimony was crucial to the issue the court was asked to decide on remand: whether the separation of the jury during deliberations had prejudiced Collins. And weighing the penalty to be imposed on Collins—life in prison—with the small burden of going through a deposition, Collins argued that he should be able to depose each juror. Collins also explained that while many of the jurors had willingly talked to him before the hearing, several had refused, stating that they preferred to speak in the courtroom. Moreover, Collins requested leave to subpoena each juror's telephone and computer usage records for the relevant time period, to ensure that the jurors had followed their instructions during their separation. The district court denied Collins' motion, noting that the State had shared all of the information from its investigation and interviews with the jurors and that Collins already had the opportunity to interview the jurors.

The State then proceeded to call each juror to testify. All 12 jurors testified that they had followed their instructions

and they had not accessed any media sources regarding the case. One alternate juror also took the stand and testified that he and the other alternate juror never participated in deliberations and that they had followed the judge's instructions. Each juror was subjected to direct and cross-examination. Both the State and Collins then gave closing argument.

Four days later, the district court entered a written order. The order memorialized the district court's initial rulings regarding Collins' previous motions, overruling both, and explained that the State had proved, "beyond a reasonable doubt," that Collins suffered no injury from the jury's separation during its deliberations. Collins appealed.

ASSIGNMENTS OF ERROR

Collins assigns, restated, that the district court erred in (1) denying Collins' motion for recusal; (2) denying Collins' motion to depose each juror to assess whether he or she had accessed prohibited information during deliberations; and (3) overruling Collins' motion for new trial, because the State failed to prove that Collins suffered no prejudice from the court's failure to sequester the jury.

STANDARD OF REVIEW

[1] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[4]

[2] Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.[5]

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[4] *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[5] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991).

[3] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[6]

ANALYSIS

Motion for Recusal

Collins argues that the judge's order shows an inability to properly address the issue presented on remand. He also argues that the judge had predetermined the outcomes for both the motion for recusal and the motion to take depositions before hearing argument. Collins claims that under these circumstances, a reasonable person would question the judge's impartiality. Our review of the record, however, does not indicate any bias or prejudice on the part of the judge, and no reasonable person under the circumstances would question the judge's impartiality in this case. As such, the judge did not abuse his discretion in denying Collins' motion for recusal.

[4,5] We have explained that in order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[7] In addition, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[8]

Collins first argues that a reasonable person reading the judge's order on remand would question the judge's impartiality. According to Collins, this is because the judge, in his order, "spent more time protecting himself, explaining why [this court] was wrong, than he did addressing the reason for the remand."[9]

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[6] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[7] *State v. Nolan, supra* note 4.

[8] *Id.*

[9] Brief for appellant at 17.

Our review of the judge's order reveals no bias or prejudice, nor is such bias or prejudice reasonably implied. The judge accurately stated both our holding in *State v. Collins*[10] and the issue on remand. It is true that the judge's order included information which was not relevant to the inquiry on remand; namely, his recounting Collins' failure to object to the jury instruction regarding the possible weekend separation of the jury. Such information was irrelevant because the sole issue on remand was whether the State could rebut the presumption of prejudice. Still, the judge understood the task before him:

> The Supreme Court found error in the Court's failure to obtain "express agreement or consent" for the jury's separation after submission of the case. [Collins] is entitled to a presumption that he was prejudiced by this separation and the State has a right to rebut that presumption on remand by showing that no injury resulted from the jury's separation.

This accurately framed the issue on remand. The judge then proceeded to analyze the evidence adduced at the hearing, and he concluded that the State had rebutted the presumption of prejudice. While the judge may have included an excess of information, the language of the order does not reveal any bias or prejudice, and a reasonable person under the circumstances would not question the judge's impartiality in this case.

Collins also argues that exhibit 374 shows that, before hearing argument, the judge had already made up his mind concerning both the motion for recusal and the motion for discovery. As a result, Collins claims the judge should have recused himself. Exhibit 374 is a letter from Collins' counsel to the judge. In that letter, counsel took issue with the court's scheduling of the evidentiary hearing on the same day as the hearings scheduled for Collins' preliminary motions. Collins' counsel explained that it did not make sense for the judge to have the State subpoena the jurors for the evidentiary hearing if the judge had not already decided to hold the hearing. And if that were the case, the judge had already decided to deny

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[10] *State v. Collins, supra* note 1.

Collins' other motions without ever hearing argument, demonstrating bias against Collins.

The judge's scheduling of hearings does not, by itself, require finding that the judge should have recused himself. In *State v. Thomas*,[11] we explained:

> Absent extraordinary circumstances, in order to disqualify a judge based upon the appearance of impropriety, the bias and prejudice *must stem from a nonjudicial source* and not from what the judge learned from his or her prior involvement in the defendant's case or cases that concerned parties or witnesses in the defendant's case.

Even assuming that the judge had preliminarily decided the outcome of these motions, Collins has made no showing that the judge based his decision on anything other than the law and facts of the case. In other words, any alleged bias or prejudice did not "stem from a nonjudicial source." Additionally, the court gave both sides an opportunity to argue their positions at the hearing, and then the court issued its rulings. The rulings themselves do not show any bias or prejudice against Collins.

While we found no similar case in our law, the Supreme Court of Ohio has addressed an analogous situation. In *In re Disqualification of Aubry*,[12] the trial judge scheduled a resentencing hearing for the defendant immediately after a hearing on the defendant's motion to withdraw his guilty plea. The defendant claimed that this showed the judge had already decided to deny the motion to withdraw and demonstrated that the judge was prejudiced against the defendant.[13]

The court first noted that a trial court had discretion to manage its own docket and that no express language existed in the scheduling order indicating bias. The court then explained that it would not be unusual for a judge, after reviewing

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[11] *State v. Thomas*, 268 Neb. 570, 581, 685 N.W.2d 69, 80 (2004) (emphasis supplied).

[12] *In re Disqualification of Aubry*, 117 Ohio St. 3d 1245, 884 N.E.2d 1095 (2006).

[13] See *id.*

the parties' legal memorandums and conducting research, to have reached some preliminary conclusions about the merits of the defendant's motion to withdraw his guilty plea. And that did not create a disqualifying bias or prejudice.[14] The court concluded:

> Judges are not required to wait until the eleventh hour to begin forming preconceptions about the proper resolution of the legal questions presented to them. In the absence of any evidence that the judge is likely to resolve the motion on grounds other than the relevant facts and the relevant law, her decision to schedule a sentencing hearing right after the motion hearing does not demonstrate that she lacks the requisite impartiality to decide fairly the issues presented to her at both of those hearings.[15]

We agree with this reasoning, and likewise conclude that there is no evidence that the judge in this case was required to recuse himself. A reasonable person, knowing the circumstances of this case, would not question the judge's impartiality under an objective standard of reasonableness. This assignment of error has no merit.

Motion to Depose Jurors

Collins asserts that the district court erroneously denied his motion to depose each juror and also obtain telephone and computer usage records. Collins argues that such information was material to the issue on remand and would have been helpful in impeaching the jurors' testimony during cross-examination. We agree that such evidence would be relevant to the issue on remand. But because that evidence was unlikely to be helpful in any significant respect, and Collins' provided no factual basis to support a different determination, we conclude that the district court did not abuse its discretion in denying Collins' motion.

Much of Collins' brief is appropriately dedicated to analyzing Neb. Rev. Stat. § 29-1917 (Reissue 2008), which deals with depositions in a criminal proceeding. But Collins also

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[14] See *id.*

[15] *Id.* at 1246, 884 N.E.2d at 1096.

claims that the court's refusal to allow Collins to depose each juror under § 29-1917 resulted in a due process violation. We note at the outset that this is not a constitutional issue. As we explained in *State v. Tuttle*,[16] a defendant in a criminal proceeding has no general due process right to discovery.

[6,7] Instead, resolution of this assigned error is controlled by statute, and specifically by § 29-1917. That statute states, in relevant part:

> The court may order the taking of the deposition [of a witness] when it finds the testimony of the witness:
>
> (a) May be material or relevant to the issue to be determined at the trial of the offense; or
>
> (b) May be of assistance to the parties in the preparation of their respective cases.

Thus, for a defendant to obtain a deposition, the defendant must make a factual showing that the deponent's testimony either (1) may be material or relevant to an issue in the trial or (2) may assist the parties preparing for trial in their respective cases.[17] But the plain language of the statute, by using the term "may," also indicates that the granting of a deposition is within the trial court's discretion.[18] As such, we have concluded that a defendant is not entitled, as a matter of right, to a deposition pursuant to § 29-1917.[19]

In *Tuttle*, the defendant wished to depose seven witnesses listed on the information.[20] When asked why the depositions were needed, the defendant's counsel explained that all the witnesses' testimony would be material to the defendant's case, and he explained that they had already given written statements or were somehow implicated in the offense. As such, he concluded that the individuals were "'extremely material

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[16] *State v. Tuttle, supra* note 5 (citing *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)).

[17] See *State v. Vela, supra* note 5.

[18] See, e.g., *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[19] See *State v. Vela, supra* note 5.

[20] *State v. Tuttle, supra* note 5.

and relevant.'"[21] He also explained that he was unable to find one of the witnesses, and had not attempted to interview the others, but that it was important to "'question them under oath prior to the trial in order to get . . . their version of the statements before trial.'"[22] The State argued that the defendant was required to make some showing that the depositions would provide useful information before they should be granted. The district court overruled the defendant's motion, explaining that it would not allow "'wholesale depositions,'" but that the defendant could request depositions in the future if he showed a special need.[23]

We explained that a party seeking a deposition in a criminal proceeding must make a factual showing to the court that the deponent's testimony satisfies one of the two statutory conditions in § 29-1917. We also noted that there was no indication that "some assistance . . . might be gained in preparing [the defendant's] defense" from the proposed depositions.[24] Thus, we concluded that the district court did not abuse its discretion in refusing to order depositions.[25]

Collins' counsel has provided similar justifications here. Defense counsel claims that the jurors' testimony was material and relevant to the issue on remand and that he needed to depose the jurors for impeachment purposes. He also claims that he needed telephone and computer usage records to verify that the jurors had each followed the jury instructions. While we agree that the jurors' deposition testimony and records would have been relevant to the issue on remand, there was no reason to think that deposing the jurors, or subpoenaing their records, would provide any useful information beyond what could be obtained through their live testimony.

Defense counsel had an opportunity to interview many of the jurors prior to the hearing. And while a few jurors refused

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[21] *Id.* at 831, 472 N.W.2d at 715.

[22] *Id.* at 831, 472 N.W.2d at 716.

[23] *Id*.

[24] *Id.* at 837, 472 N.W.2d at 719.

[25] *State v. Tuttle, supra* note 5.

to speak with defense counsel, explaining that they would prefer to speak in court, defense counsel was aware of the substance of their testimony. Additionally, the State had conducted an investigation and interviewed each of the jurors, and that information was turned over to Collins in its entirety. Neither the State's investigation nor defense counsel's interviews with the jurors gave any indication that the jury had violated their instructions, or provided any reason to believe depositions or subpoenaed records were necessary. Thus, as in *Tuttle*, there was no indication that the depositions or records would materially assist Collins in preparing for the hearing. Under these circumstances, we cannot say the district court abused its discretion in overruling Collins' motion to take depositions and subpoena records.

Motion for New Trial

Collins claims that the district court erred in overruling his motion for new trial. Collins argues that the State failed to rebut the presumption of prejudice and that therefore, the court's failure to sequester the jury requires a new trial. Our review of the record, however, shows that the State rebutted any presumed prejudice from the jury's separation. This assigned error has no merit.

Collins' brief focuses on the failure of the district court to sequester the jury and the possibility that the jurors accessed improper information. We agree that the separation of the jury during deliberations was error—that is why we remanded this cause on Collins' first appeal. And we also agree that the jurors could have accessed improper information—that is why a rebuttable presumption of prejudice exists in Collins' favor. But the issue is whether the State effectively rebutted that presumption by showing that the jurors followed their instructions and properly arrived at their verdict. The State did so.

As noted by the district court, each juror testified that he or she had followed all the jury instructions from start to finish, including while the jury was separated. The jurors did not read news about the case, watch or hear broadcasts about the case, or conduct their own independent research into issues in the case. The district court found their testimony

to be completely credible. The district court also found that their testimony effectively rebutted any presumed prejudice. There is nothing in the record to support drawing a different conclusion. The district court did not abuse its discretion in overruling Collins' motion for new trial. This assignment of error has no merit.

CONCLUSION

For each of the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOSEPH M. DORSEY, RESPONDENT.

812 N.W.2d 302

Filed May 11, 2012. No. S-12-223.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Joseph M. Dorsey, on March 22, 2012. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 25, 1973. Respondent was also licensed to practice law in the District of Columbia, but the District of Columbia Court of Appeals disbarred him from the practice of law on December 14, 1983, for obtaining money fraudulently and dishonestly and thereby engaging in conduct involving moral turpitude. See *In re Dorsey*, 469 A.2d 1246 (D.C. 1983).