

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

V

Case No. 04-1329-SD
HON. PHILIP E. RODGERS, JR.

JENNIFER MARIE DYKEHOUSE,

Defendant.

James R. Linderman (P23088)
Robert W. Mendham, Jr. (P55269)
Attorneys for Plaintiff

Mary Beth Kur (P44424)
Attorney for Defendant

DECISION AND ORDER ON APPEAL
AFFIRMING THE TRIAL COURT'S DENIAL OF
DEFENDANT'S MOTION TO DISQUALIFY JUDGE

Defendant, Jennifer Marie Dykehouse, is represented by Attorney Mary Beth Kur. The Defendant filed a motion to disqualify Judge Richard W. May from presiding over her case and any other proceedings in which Ms. Kur appears as counsel. The Defendant alleges that Judge May is personally biased or prejudiced against Ms. Kur and should be disqualified, pursuant to MCR 2.003(B)(1). The Court has reviewed the parties' briefs and dispenses with oral argument pursuant to MCR 2.119(E)(3). The request to expand the record is denied.

This Court has reviewed the briefs and the transcript of the proceedings on April 14 and 15, 2005. The Court must decide this motion by a de novo review of the record. MCR 2.003(C)(3)(a). Following such a review and for the reasons stated herein, the decision of the trial court denying the Defendant's motion is affirmed.

I.

In Michigan, a motion to disqualify a judge is made pursuant to court rule, MCR 2.003. Defendant moved to disqualify Judge May under MCR 2.003(B)(1), which states:

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

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

A judge is disqualified when he cannot hear a case impartially. The court rule sets forth a list of situations that are deemed to be the equivalent of an inability to hear a case impartially. One such instance is when the judge “is personally biased or prejudiced for or against a party or attorney.” MCR 2.003(B)(1). See, *Cain v Michigan Dep’t of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

MCR 2.003(B)(1) requires a showing of actual bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992); *Mourad v Automobile Club Ins Ass’n*, 186 Mich App 715, 731; 465 NW2d 395 (1991); *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989).

Coupled with the requirement of actual bias, MCR 2.003 (B)(1) requires that the judge be “personally” biased or prejudiced in order to warrant disqualification. This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial. *Id* at 496. The Michigan Supreme Court in *Cain, supra* adopted the definition of the words “bias” and “prejudice” found in *Liteky v United States*, 510 US 540; 114 S Ct 1147, 1155; 127 L Ed 2d 474 (1994), where the Court stated that “‘bias’ and ‘prejudice’ connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ..., or because it is excessive in degree. . .”

Further, the Court in *Liteky* stated:

First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an

extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. [*Id* at 1157.]

Thus, a favorable or unfavorable predisposition that springs from facts or events occurring in the current proceeding may deserve to be characterized as “bias” or “prejudice.” However, these opinions will not constitute a basis for disqualification “unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.*

The party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. *In re Forfeiture of \$1,159,420, supra* at 151.

II.

In the instant case, the Defendant cites the following as evidence of the Judge’s bias:

1. Judge May supported Ms. Kur’s opponent, Attorney John Jarema, in the 2004 general election when Ms. Kur sought re-election as Prosecuting Attorney for Charlevoix County. She was defeated by Mr. Jarema.
2. Judge May has an inappropriate relationship with Attorney John Jarema, e.g., he edited a pleading for Attorney Jarema and accepting free labor from Jarema in the construction of his house.
3. Judge May has inappropriate concerns over animus between Ms. Kur and Mr. Jarema which is based on unsubstantiated allegations, e.g., Ms. Kur’s gutting of the proposed budget for the prosecutor’s office for the year Mr. Jarema took office and the sabotage of the computers and phones at the prosecutor’s office that occurred on the eve of the transition.
4. On March 22, 2005, Judge May disapproved of Ms. Kur’s appointment to perform indigent defense work in Charlevoix County and made “derogatory” remarks about her to the Charlevoix County Board of Commissioners, County Commissioner Victor Patrick and Charlevoix County Circuit Judge Richard M. Pajtas.
5. Judge May quashed the subpoena for the deposition of Judge Pajtas in connection with this motion.

6. Judge May engaged in inappropriate conduct, made inappropriate remarks and issued inappropriate rulings against Ms. Kur at the hearing on the motion to disqualify him that was held on April 14 and 15, 2005.
7. Judge May decided how he was going to rule on the motion to disqualify him before he conducted the hearing on the motion.

III.

Ms. Kur's assertions that Judge May has an inappropriate relationship with Mr. Jarema are immaterial to this motion. The issue here is whether Judge May should be disqualified because he is biased or prejudiced against Ms. Kur. Whether the Judge edited a pleading for Mr. Jarema and whether Mr. Jarema provided free labor on the construction of the Judge's house may give rise to legitimate ethical questions, but do not speak to whether the Judge is biased or prejudiced against Ms. Kur and incapable of impartially hearing this case.¹

Similarly, Judge May can contribute to but may not endorse a non-judicial candidate. The record is devoid of an inappropriate endorsement. Further, a preference for one candidate is not synonymous with bias against the other.

IV.

Ms. Kur relies upon the case of *People v Lobsinger*, 64 Mich App 284; 235 NW2d 761 (1975) and argues that the fact that "Judge May does not like defense counsel" is sufficient to justify disqualification of Judge May. In *Lobsinger*, the Court held that "[w]here the trial judge acknowledged some degree of personal animus *toward the defendant*, the judge should have disqualified himself from the case." [Emphasis added.] The *Lobsinger* case is not on point because there the Judge expressed animus toward the defendant in that case, not toward defense counsel. Besides, Judge May has never stated that he dislikes Ms. Kur. In fact, he has made some very complimentary statements about Ms. Kur and her abilities as a litigator.

¹The Court understands that Ms Kur has filed a grievance against Judge May with the Judicial Tenure Commission. The Judicial Tenure Commission is the appropriate forum for such allegations.

Assuming, for the moment, that Judge May does not like Ms. Kur, the Court still does not find that sentiment alone sufficient to justify disqualification. See *People v McIntosh*, 62 Mich App 422; 234 NW2d 157 (1975), in which the Court expressed personal animus toward defense counsel. The defendant sought the disqualification of the trial judge from sentencing. The defendant asserted that denial of the disqualification motion operated to deprive him of effective assistance of counsel. He reasoned that allocution from counsel, for whose integrity, veracity and character the judge had no respect, could not possibly be fairly heard or objectively evaluated. The Court of Appeals held that denial of the disqualification motion was not error, saying:

[I]t is not counsel but the client whose case is being weighed. We suggest that if counsel had real doubts about his role in allocution, he would have better served the interests of his client by suggesting substitution of counsel than by seeking disqualification of the Court. More importantly, allocution is not a matter of emotion but of logic; defense counsel did prevail on disputed questions time after time during the course of trial by effective and professional representation of his client, notwithstanding the trial court's expressed opinions about counsel's conduct on other occasions.

Judges are human beings and naturally have personal opinions of counsel who appear before them. So long as those personal opinions do not favorably or unfavorably influence the judge's decision making in the case, there is no basis to complain. In the instant case, there is absolutely no evidence that Judge May ever allowed his personal opinion of Ms. Kur, whatever it may be, to influence his judicial decision making.

V.

The Defendant seeks not only to disqualify Judge May in this case, but also to disqualify Judge May in any case in which Ms. Kur appears as counsel, citing Judge May's "derogatory" remarks about Ms. Kur in his memo to the Charlevoix County Board of Commissioners, his "derogatory" remarks about her to Commissioner Victor Patrick and his "derogatory" comments about her to Judge Pajtas. She also relies upon the preliminary examination transcript in the *Lahr* case (Defense Exhibit 3) as an example of Judge May's animus because she claims it illustrates inappropriate "premature judgment" on this motion based solely on Judge May's

dislike of Ms. Kur. Such perpetual disqualifications are not favored and thus are granted only on very rare occasions.

In *People v Bero*, 168 Mich App 545; 425 NW2d 138 (1988), defense counsel filed a motion to permanently disqualify the judge from presiding over cases in which the attorney was counsel on the following grounds: (1) in defense counsel's first trial before the trial judge, the trial judge "engaged in numerous improper actions"; (2) after defense counsel was charged with a misdemeanor, of which he was later acquitted, the circuit court no longer appointed him as counsel for indigents on the ground that it might be alleged that he was not vigorous in his clients' defenses because he feared retaliation in his own case; apparently, defense counsel withdrew from an unrelated criminal case, where he had been appointed counsel, when the trial judge informed the defendant in that case of the appearance of impropriety which might have resulted; (3) in another unrelated criminal case, where defense counsel was appointed, the trial judge declined to hear his motion for disqualification because he had failed to attach an affidavit as required by the court rules; (4) in that same matter, the trial judge offered to appoint different counsel for the defendant because defense counsel believed that the judge was prejudiced against him and, therefore, he might act in a different manner before that judge than another judge; (5) in another unrelated civil matter, the trial judge allegedly acted in a prejudicial manner toward defense counsel, including denying his motion for disqualification in that case; (6) in yet another unrelated civil matter, the trial judge again treated defense counsel in an unfair manner and again denied his motion for disqualification; (7) the trial judge unjustifiably reduced defense counsel's attorney fees in appointed criminal cases; and (8) previous political involvements of the trial judge and defense counsel, including the judge's involvement in defense counsel's resignation as an investigator from the public defender's office following his guilty plea to a possession of marijuana charge, made it impossible for the judge to treat defense counsel fairly. Defense counsel also filed a complaint against the judge with the Judicial Tenure Commission.

The defendant claimed on appeal that he was denied a fair trial because of a long-standing conflict between his trial counsel and the trial court. The court treated the defendant's claim as one that the trial judge should have granted defendant's motion to permanently disqualify himself.

The Court of Appeals recognized that such relief was granted in *Auto Workers Flint Federal Credit Union v Kogler*, 32 Mich App 257; 188 NW2d 184 (1971). However, the Court distinguished *Auto Workers* because in *Auto Workers* a hundred motions to disqualify a certain circuit court judge were filed by a law firm and **most were granted** by the other circuit judges because the affidavits in support of those motions sufficiently disclosed prejudice and hostility toward the law firm on the basis of events which had occurred before the judge's election. The Court held that "the judge's past conduct along with a grievance filed by the law firm with the State Bar was sufficient to permanently disqualify the judge from hearing the law firm's cases." *Auto Workers, supra*.

In *Bero* on the other hand, the Court noted that defense counsel had filed 25 motions to disqualify the judge during counsel's four-year practice and, of those which had been referred to the chief judge, **all had been denied**. The Court further rejected the claim that the filing of a grievance against a judge with the Judicial Tenure Commission required him to be permanently disqualified from hearing defense counsel's cases, saying:

To hold otherwise would allow an attorney to judge shop by filing even frivolous grievances. We note that the Judicial Tenure Commission's proceedings are confidential as to the judge until a complaint is filed by the commission, the judge is privately censured, or the investigation is dismissed. MCR 9.207. Hence, we believe that disqualification is not required until the judge is privately censured or a complaint is filed by the Judicial Tenure Commission itself. [*Bero, supra* at 126.]

In the instant case, some of the incidents cited by the Defendant in support of the request to perpetually disqualify Judge May actually illustrate Ms. Kur's penchant for misinterpreting and unfavorably reacting to Judge May's otherwise benign remarks.

A.

In her brief, the Defendant cites Judge May's "premature judgment" on the merits of her motion to disqualify him as evidence of his bias or prejudice against Ms. Kur. (Defense brief at page 6).

At the hearing on this motion, Ms. Kur was adamant that Judge May decided before the hearing on this motion that he was going to deny it because he indicated to another of her clients

(Ralph Christopher Lahr), at arraignment, a few days before the hearing, that his case would be delayed because “another Judge would be looking at [the motion to disqualify him.]” (Hearing Tr. at p 29.)

However, when this Court read the transcript of the arraignment (Exhibit 3 to Defense brief), it seemed that Judge May was simply advising the defendant in that unrelated case, that his preliminary examination might not be held within 14 days as he requested because a motion to disqualify him in any case in which Ms. Kur appears as counsel was pending and would have to be decided first. “I will probably rule on her motion on Friday and [it] depends on whether she requests another Judge to review my decision or not.” (Defense Exhibit 3 at page 5.)

This Court does not find anything inappropriate regarding Judge May’s advice to the defendant in that unrelated case. What is interesting to this Court, however, is Ms. Kur’s interpretation of the Judge’s remarks – “showing he had already decided his ruling before ever hearing any testimony or receiving any evidence.”

B.

Ms. Kur had a similar, defensive reaction to Judge May’s memo to the Charlevoix County Board of Commissioners in which he explained his reasons for not approving her appointment as defense counsel to represent indigents. This Court has read that memo (Defense Exhibit 1) and does not find the memo to be “derogatory” of Ms. Kur or her professional ability. Instead, the memo clearly expresses Judge May’s legitimate concerns over whether Ms. Kur, as appointed defense counsel, and Mr. Jarema, as prosecuting attorney, would be able to work cooperatively on the very large number of criminal cases over which Judge May presides or whether their animosity toward one another would get in the way of the fair administration of justice.

As Judge May said in his ruling on this motion: “[I]t’s imperative to the operation of the Court that people work together cooperatively and with the utmost respect for other participants in the Court system.”

Objective factors that I considered, which I communicated to Judge Pajtas, was [sic] the prior lawsuit that was settled between you and Mr. Jarema, the current lawsuit in which you attribute that lawsuit to being filed by friends in [sic] political supports [sic] of Mr. Jarema. Current lawsuit that Mr. Jarema has against

the County Clerk, that he attributes to being only politically motivated for the assessment of those fines. Normally, when an election is done between attorneys or elections between attorneys and a Judge, those elections maybe those hotly contested words are put aside and forgotten. People can go on, hopefully. Concern that, uh, I had after the election was the budget that you proposed to the County Commissioners, which I think the inappropriateness of it was beyond debate. And as reported to the Court staff and as testified to here, when Mr. Jarema took office, there was [sic] substantial problems with the computer systems in the office. Both of those things, I think are objective evidence of continuing hostility or animosity.

C.

Ms. Kur alleges that Judge May's conduct, remarks and rulings at the motion hearing were inappropriate and demonstrate his animus toward her.

This Court has read the transcript of that hearing. Ms. Kur's complaint about Judge May excluding evidence about his relationship with Mr. Jarema is without merit. As this Court pointed out above in Section III, evidence regarding Judge May's relationship with Mr. Jarema is not material to the issue of whether Judge May is biased or prejudiced against Ms. Kur. Such evidence was appropriately excluded.

Ms. Kur's complaint about Judge May's questioning of Judge Pajtas at the hearing is also without merit. A trial judge has a duty to exercise reasonable control over the interrogation of witnesses and the presentment of the evidence in order to make the interrogation and presentment effective for the ascertainment of the truth. MRE 611(a)(1). Further, the court may properly interrogate witnesses, whether called by the party or the court itself. MRE 614(b). Questions designed to clarify points and to elicit additional relevant evidence, particularly in a nonjury trial, are not improper. See, *People v Baker*, 157 Mich App 613, 617; 403 NW2d 479 (1986), and *Meyering v Russell*, 53 Mich App 695, 701; 220 NW2d 121 (1974), rev'd on other grounds 393 Mich 770; 224 NW2d 280 (1974).

CONCLUSION

This is only the second case in which Ms. Kur has appeared before Judge May as defense counsel. It is the first time Ms. Kur has sought to disqualify Judge May. After a thorough review of the Defendant's allegations as well as the transcript of the hearing, the briefs and the

exhibits, the Court finds that Judge May can impartially hear this case and is not disqualified from doing so. Furthermore, there is absolutely no evidence that Judge May is biased or prejudiced against Ms. Kur. Therefore, a permanent disqualification would be without any factual foundation.

Judge May appropriately denied the disqualification motion. Judge May's decision is affirmed. This case is hereby remanded to the District Court for further proceedings.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: s/ 07/05/05