STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE COUNTY OF CHARLEVOIX

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

WAYNE DAVID WYNKOOP,

Defendant.

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File No. 09-201-SM-1
HON. PHILIP E. RODGERS, JR.
(By Assignment)

James R. Linderman (P23088)
Special Prosecuting Attorney
Attorney for Plaintiff

Robert Kaufman (P26719)
Attorney for Defendant

DECISION AND ORDER DENYING DEFENDANT'S
MOTIONS TO DISQUALIFY JUDGE RICHARD W. MAY

The Defendant was the supervisor of Norwood Township before he resigned in November of 2007. He is also the owner of Norwood Limestone Quarry, LLC, with his wife Micheline Wynkoop. In June of 2007, the Norwood Planning Commission approved a special use permit to Norwood Limestone Quarry to mine. Between May and November of 2007, Norwood Limestone Quarry was granted a contract by the Charlevoix County Road Commission to provide 23A aggregate. The Defendant was paid by the Road Commission and then the Township paid the Road Commission.

The Defendant, a public official, allegedly did not disclose to the public or the Township board that he was going to bid on the 23A aggregate or that he received the bid. The Defendant was charged with a violation of the Contracts of Public Servants Act, MCL 15321, *et seq*, and the case was assigned to the Honorable Richard W. May.

On May 12, 2009, the Defendant presented his first motion for Judge May to disqualify himself. The stated reasons for seeking disqualification were: (1) the Defendant "intends to argue that the pending prosecution is an unconstitutional selective prosecution at the instigation of his political enemies and calculated to punish him for incurring their irrelevant displeasure rather then [sic] to uphold the law" and Judge May might have to pass upon the testimonial credibility of Judge Richard Pajtas who sits in the same court building as Judge May, when he is called to testify "as to the history of his past bad relations with [the Defendant], his strong personal dislike for [the Defendant], and his knowledge of circumstances culminating in issuance of the pending complaint and any warrants for [the Defendant's] arrest; and (2) Judge May declined to order the court clerk or prosecuting attorney to produce copies of any warrant or warrants issued for the Defendant's arrest because he knew for a fact that no such warrant(s) issued and, thus, made himself a material fact witness in the case.

At the hearing on the motion, Judge May heard the testimony of the complainant, Detective Sergeant White, who testified that her investigative report and the complaint refer to a "warrant," but that she used the word "warrant" as synonymous with the word "complaint" and that no warrant was ever issued for the Defendant's arrest. The complaint was presented to and authorized by Judge May.

Judge May denied the motion for the reasons stated on the record: to-wit, no warrant was issued and the issue of whether this prosecution is an unconstitutional selective prosecution is a question of law and not an issue that will be tried to the jury. The Defendant indicated that he would seek *de novo* review of the Court's ruling.

After the hearing on May 12, 2009, the special prosecutor asked permission to approach the bench on an unrelated matter. According to the Affidavit of Judge May, he had lost his mother two days before the hearing. The special prosecutor learned of this tragedy the day before the hearing. He approached the bench to express his condolences and shook hands with the Judge. All of the affidavits submitted by the Defendant confirm that the special prosecutor shook hands with the Judge. Only one, the affidavit from the Defendant's wife, indicates that she saw the Judge mouth the words: "Good job." Defense counsel did not raise the issue of any impropriety at that time, but subsequently filed a second motion to disqualify Judge May based on an "Unseemly Public Display of Solidarity with the Prosecution."

This Court was assigned to conduct the *de novo* review and now has before it the Defendant's first and second motions to disqualify Judge May. The motions were set for hearing on Monday, June 15, 2009. The Court took the matter under advisement and now affirms the trial court ruling for the reasons stated herein:

LAW AND ANALYSIS

MCR 2.003 governs disqualification of a judge and provides, in pertinent part, as follows:

* * *

> (B) 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.
>
> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

* * *

This court rule was promulgated to protect the rights of parties to litigation and to avoid impropriety and the appearance of impropriety. See Code of Judicial Conduct, Cannon 2; *Cain v Dep't of Corrections*, 451 Mich 470; 548 NW2d 210 (1996); *In re Lawrence*, 417 Mich 248, 256; 335 NW2d 456 (1983).

Due process requires a hearing before an unbiased and impartial decision-maker. *In re Murchison*, 349 US 133, 136; 75 S Ct 623, 625; 99 L Ed 942 (1955); *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Even without a showing of actual bias, a decision-maker may be disqualified "where 'experience teaches that the probability of actual bias on the part of the . . . decision-maker is too high to be constitutionally tolerable.'" *Id*, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). In *Withrow*, the Court said:

> Not only is a biased decision-maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' *In re Murchison, supra*, at 136; *Tumey v Ohio*, 273 US 510, 532; 47 S Ct 437, 444; 71 L Ed 749 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Among these

> cases are those in which the adjudicator has a pecuniary interest in the outcome [*Gibson v Berryhill*, 411 US at 579; 93 S Ct at 1698; *Ward v Village of Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927). Cf. *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145; 89 S Ct 337; 21 L Ed 2d 301 (1968)] and in which he has been the target of personal abuse or criticism from the party before him. [*Taylor v Hayes*, 418 US 488, 501—503; 94 S Ct 2697, 2704—2705; 41 L Ed 2d 897 (1974); *Mayberry v Pennsylvania*, 400 US 455; 91 S Ct 499; 27 L Ed 2d 532 (1971); *Pickering v Board of Education*, 391 US 563, 578--579, n 2; 88 S Ct 1731, 1739-1740; 20 L Ed 2d 811 (1968). Cf, *Ungar v Sarafite*, 376 US 575, 584; 84 S Ct 841, 846; 11 L Ed 2d 921 (1964).]

Under MCR 2.003(B)(1), a judge may be disqualified on a showing of actual personal bias or prejudice. *Cain v MDOC,* 451 Mich 470, 495; 548 NW2d 210 (1996); *In re Hamlet,* 225 Mich App 505, 524; 571 NW2d 750 (1997). However, disqualification is warranted only when "the bias or prejudice is both personal and extrajudicial." *Cain, supra* at 495. The party claiming bias "must overcome a heavy presumption of judicial impartiality." *In re Hamlet, supra* at 524.

Regarding the Defendant's assertion that Judge May should be disqualified because he is a material fact witness, there is no evidence that Judge May "has personal knowledge of disputed evidentiary facts concerning the proceeding," MCR 2.003(B)(2). All that has been demonstrated is that Judge May has knowledge of the contents of the case file. All judges should have such knowledge and it cannot warrant disqualification.

Without question, facts learned during the course of a judicial proceeding do not form a basis for disqualification pursuant to MCR 2.003(B)(2). *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). In *In re Thurston, supra* at n 3, the Court said:

> In clarifying the so-called "extrajudicial source doctrine" of disqualifying judicial bias, usually traced to *United States v Grinnell*, 384 US 563; 86 S Ct 1698; 16 L Ed 2d 778 (1966), the United States Supreme Court recently observed:
>
> > Not all unfavorable disposition towards an individual (or his case) is properly described by those terms ['bias or prejudice']. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words 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 (for example,

> a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities) or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). The 'extrajudicial source' doctrine is one application of this pejorativeness requirement . . .
>
> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Liteky v United States, 510 US 540; 114 S Ct 1147; 127 L Ed 2d 474, (1994). Michigan jurisprudence expressly accords with these principles. *Cain v Dep't of Corrections*, 451 Mich 470, 494-497; 548 NW2d 210 (1996).

Since the Defendant relies solely on facts that Judge May learned from authorizing the complaint and presiding in this case, disqualification is not required. See, *Tingley v Wardrop*, 2005 WL 428287; 265 Mich App 264.

The Defendant's assertion that this is an unconstitutional selective prosecution is properly the subject of a motion to quash the complaint or dismiss. It presents a question of law for the Court to decide, but it does not present grounds for disqualification of the presiding judge. MCR 2.003. Further, any party aggrieved by Judge May's ruling may appeal where the question will be reviewed de novo.

The prosecutor, not the judge, is the constitutional officer with discretion to decide whether to initiate charges and what charges to bring. *People v Venticinque,* 459 Mich 90, 100; 586 NW2d 732 (1998); *People v Herrick,* 216 Mich App 594, 598; 550 NW2d 541 (1996). The principle of separation of powers restricts judicial interference with the prosecutor's exercise of this executive discretion. *Id.* This discretion over what charges to file will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *People v Oxendine,* 201 Mich App 372, 377; 506 NW2d 885 (1993). See *In re Hawley,* 238 Mich App 509, 512; 606 NW2d 50, 52 (1999).

> The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised. *United States v Falk*, 479 F2d 616, 620-621 (7th Cir 1973).

In order to prevail, the Defendant will have to show that (1) other, similarly-situated persons have themselves not been prosecuted (i.e., that the defendant has been "singled out"); and (2) that the government's selective behavior is invidious and in bad faith (i.e., based upon impermissible considerations such as race, religion or the desire to prevent the defendant from exercising his other constitutional rights). *United States v Berrios*, 501 F2d 1207 (2d Cir 1974). The Defendant has not presented any evidence that Judge May would be biased or partial when deciding such a motion.

Instead, the Defendant alleges actual personal and political bias or prejudice against him by others, including Judge Pajtas, who sits on the Circuit Court bench in the same building as the Judge sought to be disqualified. Ignoring for the moment that it is the Prosecutor who initiates charges and assuming that Judge Pajtas is a proper witness with relevant evidence to offer on a primarily legal issue and that Judge Pajtas is biased and prejudiced against this Defendant, this Defendant has failed to overcome the heavy presumption of judicial impartiality by Judge May. No rule requires disqualification when a judge from one bench appears as a witness in a case presided over by a judge from a different bench because they have offices in the same building. The record is devoid of factual support for the proposition that Judge May has "a deep-seated favoritism or antagonism that would make fair judgment impossible." *In re Hamlet, supra* at 505.

In his second motion to disqualify Judge May, the Defendant asserts as new grounds for disqualification Judge May's conduct at the May 12, 2009 hearing. Specifically, the Defendant complains that the Judge engaged in an unseemly public display of solidarity with the prosecution; engaged in intemperate, impertinent inquiries and interruptions of defense counsel, was indifferent to the knowing falsity of the complaint, and misused his authority over the examination of witnesses for the possible purpose of preventing a witness from giving answers reflecting unfavorably on himself.

This Court has read the transcript of the hearing. Defense counsel had a difficult time focusing on the motion for disqualification and instead insisted on arguing that the Defendant was the target of a selective prosecution. Judge May was correct when he pointed out to defense counsel that whether or not a warrant had been issued for the Defendant's arrest was irrelevant to the charges pending against the Defendant. He was also correct when he ignored any alleged deficiencies in the complaint because the sufficiency of the complaint was not an issue before him at the hearing. The only issue before Judge May was whether he should be disqualified from presiding over the trial of the Defendant on the charge that he violated the Contracts of Public Servants Act. Yet, defense counsel repeatedly questioned the witness about a warrant and repeatedly returned to the topic of the warrant and the content of the complaint. The Judge's impatience and his attempts to force defense counsel to focus on relevant issues were understandable and appropriate. Whether the Judge's inquiries of counsel were "impertinent" is a matter of opinion. The transcript can be read either way. This Court finds no clear evidence of any inappropriate conduct on the Judge's part that merits disqualification.

The Defendant's allegation that the Judge engaged in an "unseemly public display of solidarity with the prosecution" is a curious one. Admittedly, *after* the hearing on May 12, 2009, Judge May and the special prosecutor had a brief exchange at the beach and shook hands. The Judge and the special prosecutor have both attested to the fact that this exchange was in the context of the special prosecutor's expressing his condolences over the recent passing of the Judge's mother and had nothing to do with the case. The only eyewitness to ascribe any inappropriate behavior to the Judge is the Defendant's wife who claims that she saw the Judge mouth the words: "Good job." She does not claim to have heard anything or expressed any expertise at lipreading.

First, the exchange at the bench as well as the hearing did not take place in the presence of the jury, so the fact finder could not be influenced by either event. Second, there is nothing inappropriate in a lawyer expressing and the Court accepting condolences for a recent personal loss. The Court is satisfied that the Defendant misunderstood the exchange at the bench. Had the Defendant or his counsel raised the issue when it was first perceived, their misperception could have been quickly corrected. In any event, counsel has not cited any authority for the proposition that an expression of condolences under such circumstances is grounds for disqualification.

In *Caperton v A.T. Massey Coal Co, Inc*, --- S Ct ---, 2009 (US W Va, 2009); 2009 WL 1576573, 1, the United States Supreme Court most recently discussed the breadth of the Due Process Clause beyond the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, *Tumey v Ohio,* 273 US 510, 523; 47 S Ct 437; 71 L Ed 749. The Court noted that, as new problems arise that were not discussed at common-law, it has identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow v Larkin,* 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712.

In such extreme cases, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey, supra* at 532; *Mayberry v Pennsylvania,* 400 US 455, 466; 91 S Ct 499; 27 L Ed 2d 532 (1971); *Aetna Life Ins Co v Lavoie,* 475 US 813; 106 S Ct 1580; 89 L Ed 2d 823. In defining these standards the Court asks whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton,* quoting *Withrow,* 421 US, at 47, 95 S Ct 1456. The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." *Caperton, supra.*

In *Caperton, supra,* one of the parties contributed $3,000,000 to one of the candidates for the West Virginia Appeals Court, knowing, if elected, he would be hearing the case. When subsequently elected, he refused to recuse himself. The Supreme Court reversed on due process grounds. This case does not involve this type of extreme circumstances.

CONCLUSION

This case does not involve the type of extreme circumstances that would require implementation of the Due Process Clause by objective standards that do not require proof of actual bias. Therefore, the Defendant is required to show actual bias. The Defendant has failed to meet his burden. He has not overcome the presumption of judicial impartiality.

Furthermore, this case is set for a jury trial. Judge May will not be the fact finder. He will not be assessing the credibility of witnesses. As in any jury trial, the jurors will be instructed to absolutely disregard any impression they may have regarding the Judge's personal opinions about the case. Questions of law are reviewed *de novo* on appeal. Therefore, both of the Defendant's motions for disqualification are denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/23/09