

Supp. App.

COURT OF APPEALS
DIVISION II

No. 36880-3 -II

09 MAY 26 AM 9:33

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON,

Appellant,

v.

BOBBY D. BEASLEY, JR.,

Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00139-5

SUPPLEMENTAL BRIEF OF APPELLANT

REINHOLD P. SCHUETZ
Special Deputy Prosecutor
Attorney for Appellant
WSBA # 9070

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 fax

reinstated 1/11/11

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2. Does a trial court with a local practice of not hearing matters in which local counsel are witnesses whose credibility would thus need to be judged have a duty to recuse itself from hearing a matter where opposing counsel before it are each a local counsel, each is a factual witness to a contested incident and the personal credibility of each is central to the factual determination that the court would be required to make? (Assignment of Error 1, 2 and 3.)6

3. The trial court first disclosed to the two opposing counsel that it was “uncomfortable” making a head on factual determination involving the credibility of the two opposing counsel in the course of reciting its oral opinion which is the subject of the original appeal herein. Some months later, in the course of recusing itself from another matter, the court revealed that it had a local practice of not hearing matters in which local counsel were witnesses whose

credibility would thus need to be judged. Given the full combination of scenarios now known to exist, did the court violate its duties under the Code of Judicial Conduct? (Assignments of Error 1, 2, 3 and 4).
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4. The trial court was advised that defense counsel had made a statement to a local detective that “everything I told the court was a lie” and that the detective had responded to defense counsel that he believed defense counsel had just made a “Freudian slip”. Did the court’s failure to address such issue through a hearing before a visiting judge in light of the full combination of scenarios now known violate the court’s duties under the Code of Judicial Conduct? (Assignment of Error 1, 2, 3, and 4.).....6,7

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A. ASSIGNMENTS OF ERROR

No. 1. The trial court erred in failing to disclose to the parties that the court had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged.

No. 2. The trial court erred in violating the court's local practice of not presiding over matters in which local counsel were witnesses whose credibility would thus need to be judged.

No. 3. The trial court erred in denying Appellant's Motion to Vacate Judgment by order entered on January 26, 2009.

No. 4. The trial court erred in failing to address that portion of Appellant's Motion to Vacate Judgment which advised the court of a statement by Respondent counsel indicating that "everything I told the court was a lie".

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. Does a trial court with a local practice of not hearing matters in which local counsel are witnesses whose credibility would thus need to be judged have a duty to advise opposing counsel before it of such practice, when each is a local counsel, each is a factual witness to a contested incident and the personal credibility of each is central to the factual determination that the court will be required to make? (Assignments of Error 1, 2 and 3.)

No. 2. Does a trial court with a local practice of not hearing matters in which local counsel are witnesses whose credibility would thus need to be judged have a duty to recuse itself from hearing a matter where opposing counsel before it are each a local counsel, each is a factual witness to a contested incident and the personal credibility of each is central to the factual determination that the court would be required to make? (Assignments of Error 1, 2 and 3.)

No. 3. The trial court first disclosed to the two opposing counsel that it was "uncomfortable" making a head on factual determination involving the credibility of the two opposing counsel in the course of

reciting its oral opinion which is the subject of the original appeal herein. Some months later, in the course of recusing itself from another matter, the court revealed that it had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged. Did the court's hearing this matter despite the full combination of scenarios now known violate the court's duties under the Code of Judicial Conduct? (Assignments of Error 1, 2, 3 and 4.)

No. 4. The trial court was advised that defense counsel had made a statement to a local detective that "everything I told the court was a lie" and that the detective had responded to defense counsel that he believed defense counsel had just made a "Freudian slip". Did the court's failure to address such issue through a hearing before a visiting judge in light of the full combination of scenarios now known violate the court's duties under the Code of Judicial Conduct? (Assignments of Error 1, 2, 3 and 4.)

C. STATEMENT OF THE CASE

The statement of the case pertaining to the original appeal has been previously set forth in the first Brief of Appellant and is incorporated herein by reference.

The Finding, Conclusions and Orders appealed in that original appeal were entered by the trial court in September and November of 2007.

While the proceedings in State v. Beasley, Mason County Superior Court cause number 07-1-00139-5 were dismissed as a result of the decision being appealed therein, the proceedings in State v. Beasley, Mason County Superior Court cause number 07-1-00345-2 continued. However, on February 29, 2008 the same trial court ultimately recused itself because "...

I am concerned that Mr. Finlay has a idea at this point that he is not being treated fairly, which would then, I'm sure, trickle down to the feelings of his client.” (CP 169, CP 169 (Attachment 1), see also CP 169 (Attachment 2))

On Tuesday, June 3, 2008 the matter of State of Washington v. Allen G. Moore, Mason County Superior Court cause number 08-1-00171-7, was called for trial before the same trial court. (CP 149) The same deputy prosecutor assigned to the Beasley matter was also assigned to the Moore matter. That deputy prosecutor had been advised by the court administrator on the previous day that the Moore case would be the number one trial to be called out on June 3, 2008. After arriving in the main superior court courtroom that morning for trial call the deputy prosecutor was advised by other counsel that the Moore matter would not be going to trial. The reason given was that the two superior court judges were both recusing themselves due to local counsel Jeannette Boothe being a state's witness in the Moore matter. (CP 149)

The deputy prosecutor initially confirmed this information with the Honorable James Sawyer in chambers. Judge Sawyer cited the Judicial Canons as the basis for the recusal. (CP 149) The deputy prosecutor then proceeded to the courtroom where the Moore matter was to be called by the Honorable Toni Sheldon. After an initial discussion in chambers initiated by

Judge Sheldon with the deputy prosecutor and counsel for defendant Moore, the Moore matter was called on the record. Thereupon, Judge Sheldon made a record of the court's policy and/or practice of "not to preside over cases in which there are fact witnesses that are local attorneys, and I have seen the same has occurred with Judge Sawyer". (CP 149, CP 149 (Attachment 1)) That the deputy prosecutor was not aware of this unwritten policy or practice of the court. (CP 149) Judge Sawyer subsequently confirmed to the deputy prosecutor that this local practice had been in effect for "a long time". (CP 178)

The Moore matter was later called for status before Judge Sawyer on Friday, June 6, 2008. Judge Sawyer thereupon made a record of the fact that he had re-reviewed the Judicial Canons and no longer felt the Judicial Canons precluded his presiding over the matter. Judge Sawyer agreed with defense counsel's position that he would be presiding over a jury trial and would thus not be in a position of being the fact finder and having to judge the credibility of the local counsel named as a state's witness in the matter. (CP 149, CP 149 (Attachment 2))

The state filed its motion to vacate judgment and supporting declarations on August 15, 2008. (CP 148, 149, 150) Subsequent to the Moore hearings and prior to such filing, the deputy prosecutor was advised

by Shelton Police Department Detective Harry Heldreth that Beasley's defense counsel had recently approached him and made unsolicited comments to him about the Beasley case, and that such contact culminated with the following:

That after Mr. Finlay made various statements as to his perspective on the Beasley case and its contested motion to dismiss, he concluded by stating "and everything I told the court was a lie". He then paused, turned beet-red, and stammered that he had meant to say that everything he had said to the court was the truth. I indicated to him that I believed he had just made a "Freudian Slip". (CP 150)

The lower court heard argument on the state's motion to vacate judgment on October 23, 2008. (CP 173, RP 1 - 23) At the outset of its argument on the merits of the motion, the state reiterated its position that:

"the only issue appropriate for the court to decide today, relative to the motion that is filed, is the actual vacation based on the irregularity in the court proceedings.

And any further decision based on any statements made by Mr. Finlay to Detective Heldreth, et cetera, et cetera, actually would require the court to invoke its own local practice and have a hearing by a visiting judge if that was going to be the determinative factor. (RP 13 - 14)

When no decision was forthcoming, the state noted a Motion for Decision with a supporting Declaration on January 9, 2009. (CP 181, 182) The court then made an oral decision on the record denying the state's motion to vacate judgment on January 26, 2009 (CP 186, RP 24 - 26) An

Order Denying State's Motion to Vacate Judgment was filed that same day.

(CP 185)

The lower court neither addressed nor acted upon the state's motion as it pertained to the statements by Beasley's defense counsel to Detective Heldreth and the resultant question of defense counsel's credibility raised by the state's pleadings.

D. ARGUMENT

1. Does a trial court with a local practice of not hearing matters in which local counsel are witnesses whose credibility would thus need to be judged have a duty to advise opposing counsel before it of such practice, when each is a local counsel, each is a factual witness to a contested incident and the personal credibility of each is central to the factual determination that the court will be required to make? (Assignments of Error 1, 2 and 3.)
2. Does a trial court with a local practice of not hearing matters in which local counsel are witnesses whose credibility would thus need to be judged have a duty to recuse itself from hearing a matter where opposing counsel before it are each a local counsel, each is a factual witness to a contested incident and the personal credibility of each is central to the factual determination that the court would be required to make? (Assignments of Error 1, 2 and 3.)
3. The trial court first disclosed to the two opposing counsel that it was "uncomfortable" making a head on factual determination involving the credibility of the two opposing counsel in the course of reciting its oral opinion which is the subject of the original appeal herein. Some months later, in the course of recusing itself from another matter,

the court revealed that it had a local practice of not hearing matters in which local counsel were witnesses whose credibility would thus need to be judged. Given the full combination of scenarios now known to exist, did the court violate its duties under the Code of Judicial Conduct? (Assignments of Error 1, 2, 3 and 4.)

4. The trial court was advised that defense counsel had made a statement to a local detective that “everything I told the court was a lie” and that the detective had responded to defense counsel that he believed defense counsel had just made a “Freudian slip“. Did the court’s failure to address such issue through a hearing before a visiting judge in light of the full combination of scenarios now known violate the court’s duties under the Code of Judicial Conduct? (Assignments of Error 1, 2, 3 and 4.)

CrR 7.8 Analysis and Argument

The state sought relief below under CrR 7.8 (Relief from Judgment or Order). Either party may move for relief from judgment under such rule. State v. Hall, 162 Wash.2d 901, 177 P.3d 680 (2008) specifically recognizes this, holding:

Initially, we need to determine if the State may seek relief pursuant to the provisions of CrR 7.8. The rule allows the court to grant relief from a judgment if the judgment is void or for any other reason justifying relief from the operation of judgment. (Footnote omitted) The State argues that CrR 7.8(b) allows either party to move for relief from judgment. We agree the language of the rule does not restrict either party's ability to move for relief. Thus, the State generally has the authority to move to vacate a judgment under CrR 7.8(b).

The primary thrust of the state's motion to vacate judgment below centered on the court's disclosure, made in an unrelated case several months after the defense motion to dismiss herein was granted, that the court has a local practice of not presiding over matters in which local counsel were witnesses whose credibility would thus need to be judged. That disclosure called into question the very nature of the proceedings previously held in this matter, and, more pointedly, called into question the regularity of those proceedings. The court in State v. Aguirre, 73 Wash.App. 682, 871 P.2d 616 (1994) spoke to the applicability of CrR 7.8 under such a scenario:

A trial judge should not vacate a conviction pursuant to CrR 7.8(b)(5) absent, "extraordinary circumstances not covered by any other section of the rule." State v. Brand, 120 Wash.2d 365, 369, 842 P.2d 470 (1992). "Extraordinary circumstances" must relate to "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." Shum v. Department of Labor & Indus., 63 Wash.App. 405, 408, 819 P.2d 399 (1991) (quoting In re Marriage of Flannagan, 42 Wash.App. 214, 221, 709 P.2d 1247 (1985), *review denied*, 105 Wash.2d 1005 (1986)).

See also State v. Olivera-Avila, 89 Wash.App. 313, 949 P.2d 824 (1997) (These extraordinary circumstances must relate to fundamental, substantial irregularities in the court's proceedings . . .).

Here, the trial court violated its now-acknowledged practice of not presiding over matters in which local counsel were witnesses. Especially troubling is the fact that this practice was not known by or disclosed to the parties and could thus not be invoked except by the court, the sole party with the knowledge of the practice. It is difficult to conceive of anything

more fundamentally irregular than a proceeding which, unbeknownst to the parties but known to the magistrate, should not have been before or heard by a particular magistrate but was conducted by and before that particular magistrate regardless.

Additionally troubling, in hindsight, is the court's disclosure for the first time during its oral decision of August 14, 2007 herein that it was "uncomfortable" with making the decision at all. The stated reason for that discomfort was not due to any difficulty with the law or the facts, but because of the two local counsel whose credibility the court was judging. It is now known that the very scenario that the court's local practice was designed to avoid resulted in the court's discomfort. The court's failure to acknowledge this troubling scenario and its plowing ahead with a decision in the face of this very scenario is an extremely troubling, fundamental and substantial irregularity in the court's proceedings.

Finally, as set forth in the initial appeal herein, it must be remembered that the trial court, in giving its original oral decision from the bench, acknowledged the responsibility of a court. The trial court specifically indicated that a court, in choosing not to recuse itself, is required to advise the parties of some situation so that the parties might have the chance to take appropriate action. (RP 208) Yet the court failed to do this very thing when it failed to timely disclose to the parties that it was "uncomfortable" making a "head-on" factual determination relating to the credibility of counsel. Now it is known that the court failed not only to take the initial appropriate recusal action and failed not only to make the appropriate disclosure that would have given the parties a fair opportunity to address the court's acknowledged but late-disclosed discomfort, but also failed to advise the parties that the court's local practice precluded the

court's sitting on the matter in any event.

Code of Judicial Conduct Analysis and Argument

The total scenario now known to exist below also fails to meet the standards of the Code of Judicial Conduct (CJC) that governs the conduct of judges in the State of Washington. As argued in the initial Brief of Appellant herein, the CJC mandates, inter alia, that “Judges shall uphold the integrity and independence of the judiciary“ (Canon I), that “Judges should avoid impropriety and the appearance of impropriety in all their activities“ (Canon 2), that “Judges shall perform the duties of their office impartially and diligently (Canon 3) and that “Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned (Canon 3D).

Because the effect on the public's confidence can be debilitating where a judge's decisions are tainted by even a mere suspicion of partiality, case law in this area has consistently held that this is an area where a court must err on the side of caution.

“ [j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.”
In re Disciplinary Proceeding Against Sanders, 159 Wash.2d 517, 145 P.3d 1208 (2006), citing State v. Graham, 91 Wash.App. 663, 670, 960 P. 2d 457 (1998),

quoting Sherman v. State, 128 Wash.2d 164, 205-06, 905 P.2d 355 (1995).

The Sanders court noted that the Sherman court had:

. . . set the test for determining impartiality: [I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating.... The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that “ a reasonable person knows and understands all the facts.” (Footnote omitted) Sanders, supra, at 524 – 525.

What is not relevant to the question at hand is whether the court itself feels it can be or is fair and impartial.

The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case.

...

Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's ‘impartiality might reasonably be questioned’ is a basis for the judge's disqualification.

...

“ The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all of the circumstances.”

Sanders, supra, at 526, citing and quoting with approval from Rice

v. McKenzie, 581 F.2d 1114, 1116 (4th Cir.1978).

In the initial appeal herein, it was argued that the objective facts were:

1. The court had appointed the spouse of counsel for the defendant as one of its appointed court commissioners.
2. The court had before it said commissioner's spouse as counsel for the defendant.
3. The credibility of counsel for the defendant was central to a decision as to the defendant's motion to dismiss.

Now a fourth objective fact must be added:

4. At the time of the controversy presided over and heard by the court, there was in effect a local court practice "not to preside over cases in which there are fact witnesses that are local attorneys".

It is respectfully submitted that a reasonable person faced with the totality of these facts might reasonably question the court's impartiality.

While all the arguments pertaining to Canon 3D made in the original Brief of Appellant still apply (Brief of Appellant, pp. 14 - 20), the disclosures made by the trial court in the course of its oral decision of August 14, 2007 herein that is was "uncomfortable" with making the decision at all now also raises CJC concerns. The stated reason for that discomfort was not due to any difficulty with the law or the facts, but because of the two local counsel whose credibility the court was judging.

The totality of the scenario know known to have existed a the time of the

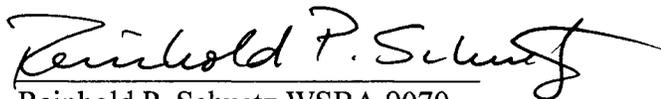
court's presiding over this matter includes the existence of the court's local practice not to hear matters that would involve judging the credibility of local counsel appearing as witnesses before it. In addition to all the other factors ignored by the court in choosing to forge ahead with its decision (Brief of Appellant, pp. 19 - 21), the court ignored its own local practice that called it for it to step aside at the outset. Under such new totality of the circumstances, it is even clearer that the court below, rather than err on the side of caution on the question of recusal, threw caution to the winds.

E. CONCLUSION

For the reasons set forth above, it is respectfully requested that the lower court's denial of the state's motion to vacate judgment be reversed.

DATED this 22nd day of May, 2009.

Respectfully submitted,



Reinhold P. Schuetz WSBA 9070
Special Deputy Prosecuting Attorney
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 BOBBY D. BEASLEY, JR.,)
)
 Respondent.)
 _____)

No. 36880-3-II

DECLARATION OF
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PROOF OF SERVICE

BY
DEPUTY

STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

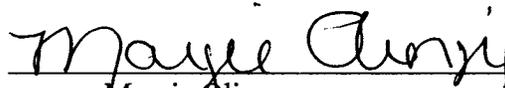
I, MARGIE OLINGER, declare and state as follows:

On May 22, 2009, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (SUPPLEMENTAL BREIF OF APPELLANT), to:

Bruce Finlay
P.O. Box 3
Shelton, WA 98584

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 22nd day of May, 2009, at Shelton, Washington.


Margie Olinger

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 FAX