

NO. 47366-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREA ADLER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

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BRIEF OF APPELLANT

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## **TABLE OF CONTENTS**

A.	ASSIGNMENTS OF ERROR .....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	2
	1. Procedural History .....	2
	2. Substantive Facts .....	2
C.	ARGUMENT .....	9
	1. THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF BECAUSE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED. ....	9
	2. IN THE EVENT THIS COURT DETERMINES THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED BECAUSE THE REQUEST FOR RECUSAL WAS UNTIMELY, ADLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.....	13
D.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Washington Cases

<u>Sherman v. State</u> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	10, 11
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993).....	14
<u>State v. Carlson</u> , 66 Wn. App. 909, 833 P.2d 463 (1992), <u>review denied</u> , 120 Wn.2d 1022 (1993).....	9, 15
<u>State v. Davis</u> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	11
<u>State v. Madry</u> , 8 Wn. App. 61, 504 P.2d 1156 (1972) .....	10
<u>State v. Romano</u> , 34 Wn. App. 567, 662 P.2d 406 (1983) .....	10
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	14
<u>Tatham v. Rogers</u> , 170 Wn. App. 76, 283 P.3d 583 (2012) .....	10

### Federal Cases

<u>In re Murchison</u> , 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955).....	10
<u>Offutt v. United States</u> , 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954)...	10

### Statutes

RCW 4.12.050 .....	13
RCW 9A.60.020(1).....	2

### Rules

CJC Canon 2, Rule 2.11(A).....	9, 10
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### Constitutional Provisions

U.S. Const. amend. VI .....	9, 14
Wash. Const. art. I, § 22.....	9, 14

A. ASSIGNMENTS OF ERROR

1. The trial judge erred in failing to recuse himself.

2. Trial counsel's lack of diligence in bringing the motion to recuse constitutes ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charged with forging her ex-husband's signature on an insurance check. There was evidence of the animosity between appellant and her ex-husband, and the trial judge, was called to resolve their disputing testimony at the bench trial. Trial counsel discovered after trial that the judge had heard and ruled against appellant on a motion in the dissolution action, commenting negatively on her credibility and tactics. Counsel moved for a new trial, asking the judge to recuse himself, but the judge declined. Where the judge's impartiality in the criminal proceeding could reasonably be questioned in light of his involvement in the dissolution proceeding, was there a violation of the appearance of fairness, the canons of judicial conduct, and due process?

2. Did trial counsel's failure to investigate the judge's participation in the dissolution case and file a timely motion to recuse deny appellant effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On January 23, 2014, the Cowlitz County Prosecuting Attorney charged appellant Andrea Adler with one count of forgery. CP 1-2, 13-14; RCW 9A.60.020(1). Adler waived her right to a jury trial, and the case proceeded to bench trial before The Honorable Michael Evans. CP 4. The court found Adler guilty and imposed a sentence of three days confinement, converted to 25 hours of community service. CP 21-24, 31. Adler filed this timely appeal. CP 37.

2. Substantive Facts

Andrea Adler was separated from her husband, Trevor Adler, for four years before their dissolution was final in May 2014. RP 111. Under the terms of their separation agreement, Trevor paid Adler child and spousal support. Adler also had exclusive use of a vehicle owned by the couple, but Trevor was required to maintain insurance coverage. RP 13-14. At some point the insurance company discontinued its coverage<sup>1</sup>, and Trevor signed over his interest in the car to Adler. RP 14-15. He did not inform her of that action, however. RP 112.

Adler had been involved in an accident in October 2012, but she did not immediately file a claim with the insurance company, not wanting

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<sup>1</sup> Trevor testified the insurance was discontinued because Adler had numerous accidents, and Adler testified it was because she had a speeding ticket. RP 14-15, 113.

her insurance rates to increase. When she learned that her coverage had been dropped, however, she filed a claim for covered damages. RP 112-13. In May 2013, Adler received a check from State Farm<sup>2</sup> insurance company for \$1836 in settlement of the claim. RP 112. The check was made payable to both Andrea and Trevor Adler. RP 20; Exhibit 3A.

Adler contacted Red Canoe Credit Union, where she and Trevor had accounts, to find out what was required to negotiate the check. She was informed that both she and Trevor needed to sign the check. RP 45, 80. Adler then contacted Trevor. RP 113.

There was disputing testimony as to how this conversation proceeded. According to Trevor, Adler said she did not plan to use the funds from the check to have the car fixed but planned instead to spend the money on rent, utilities, food, and possibly clothing. RP 16-17. Trevor disagreed with this plan and they argued for some time. Finally Adler said she would use the money to fix the car, but Trevor told her he did not believe her. Adler then said she would just sign his name on the check and do whatever she wanted. RP 17-19.

Adler testified, however, that she asked Trevor if her mother could bring him the check to sign and then take it to the credit union to deposit.

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<sup>2</sup> The trial court's findings of fact mistakenly refer to Allstate Insurance Company as the issuer of the check. CP 21-24. The check admitted in evidence is from State Farm, and there was no evidence at trial regarding Allstate. Exhibit 3A.

Trevor said that was fine and he would sign the check. RP 113-14. Adler was living in Kitsap County, and her mother was going to make the trip to Cowlitz County so that Adler would not have to make such a long drive with the children. The plans changed, however, and the next day, Adler and the children, instead of her mother, drove to Cowlitz County. RP 114. When Adler was about ten miles away from Trevor's house, she called him to let him know she was almost there. Trevor told her she was too late, and he was going fishing. They argued, and he refused to meet her to sign the check. RP 114-15.

Adler testified that she signed Trevor's name to the check, as she had signed all the checks they received during their marriage. RP 115. She made no attempt to make the signature look like Trevor's. RP 116. She presented the check to the credit union, where the teller deposited it to Adler's account without verifying Trevor's signature. RP 48-50. Sometime later, Trevor contacted the credit union and the police to report that Adler had signed his name on the check without his permission. RP 34.

Much of the State's evidence at trial focused on substantiating Trevor's claims that Adler used the proceeds from the check inappropriately. Trevor testified that he had seen Adler's car numerous times since June 2013, when he met Adler to pick up and drop off his

children for weekend visits, and the damage he could see to the front end of the vehicle had not been repaired in that time. RP 26-27.

An employee from the credit union testified that there was some large spending from Adler's account right after the check was deposited. She testified that \$600 was withdrawn at the time of the deposit, and there were ATM withdrawals of \$202 and \$102 and a withdrawal at a casino of \$470 over the next several days. There were also purchases at gas stations, drug stores, restaurants, and clothing stores, depleting the balance in the account. RP 74-77. None of the transactions in the account were directly related to car repairs. RP 77.

In response to the State's evidence, the defense presented testimony from James Morgan. Morgan testified that Adler hired him to repair her car in June 2013. RP 90. He repaired the engine and got the car in working order, but he did not repair the extensive body damage to the front end of the vehicle. RP 94-95. Adler paid Morgan just over \$1900 in cash for his work on June 7, 2013. RP 93, 101.

Adler testified she did not recall telling Trevor she planned to use the money for anything other than fixing the car, although she told him she did not plan to fix the bumper. She wanted the money from the insurance check to fix the car. RP 115. Adler testified that the cash she withdrew from her Red Canoe account, along with other cash she had saved or

borrowed, was used to pay for the car repairs, which totaled over \$1900. RP 118-20. On the drive home after depositing the check she also spent money on gas, clothes for the children, and food. RP 117.

In its oral ruling the court said it was clear Adler falsely completed a written instrument by signing Trevor's name without authority, and the issue was whether she had intent to injure or defraud. RP 169. The court considered the fact that Adler and Trevor were in the middle of a long divorce, and she probably acted out of hurt feelings and frustration that Trevor was not willing to sign the check. RP 170-71. She called the credit union and put a plan in place to get the check cashed. The court's sense was that Adler thought she could get the car fixed for less than the amount of the check, so she saved out some cash for car repairs. Or she could have been really mad at Trevor and decided to forge his signature and do whatever she wanted with the money. The court said it thought the latter was more likely. RP 173-74.

In its written decision, the court resolved the disputed facts in favor of the State, accepting Trevor's testimony and rejecting Adler's testimony about what they said to each other. CP 22. It found that

9. Defendant told [Trevor] that she wanted to use the funds to pay for clothing and rent and other items which were not associated with the repair of the vehicle.

10. Trevor Adler refused to sign the check. He did not agree with the defendant's intended use of the insurance proceeds.

11. Defendant informed her estranged husband that she planned to sign the check herself.

CP 22. It further found that Adler signed Trevor's name on the check without authority and attempted to pass it off as true with intent to defraud Red Canoe Credit union. CP 23.

After court returned its verdict, the defense filed a motion for new trial. CP 15-17. In his declaration attached to the motion, defense counsel explained that after evidence and argument but before the court returned its verdict, Adler remembered that Judge Evans had heard a pro se motion she had brought in her divorce case in the fall of 2013. Counsel then reviewed the video proceedings and found that on September 30, 2013, Judge Evans heard a motion Adler brought to reopen the GAL investigation. Trevor Adler's attorney alleged at the hearing that Adler was "gaming the system" by delaying the trial date and was non-compliant with discovery obligations. Judge Evans ruled against Adler, specifically noting that Adler had engaged in "purposeful foot dragging." CP 16.

Counsel further explained in the declaration that Judge Warning had previously notified the parties in the instant criminal proceeding that neither Commissioner Maher nor Judge Bashor could preside over the trial because they had heard the divorce trial and settlement conference. CP 16. Commissioner Maher and Judge Bashor recused themselves. CP 5-6.

Counsel said he assumed that Judge Warning had screened the divorce case for involvement by Judge Evans as well, and he therefore did not do that himself. CP 16.

Counsel argued that Judge Evans' involvement in the divorce proceeding violated the appearance of impartiality, and Adler was therefore entitled to a new trial. CP 16-17. Counsel argued that Judge Evans' prior involvement was especially problematic since this was a bench trial and Judge Evans was the trier of fact, and the facts of the criminal case involved a dispute between Adler and her ex-husband. RP 184-85.

Judge Evans denied the motion. He noted that he had presided over the readiness hearing in this case a week before trial, and Adler did not tell her attorney at that time about his involvement in the dissolution proceeding. Moreover, there was time to file an affidavit of prejudice, and she did not do so. RP 192-94. Judge Evans said he did not remember hearing a matter in the dissolution case, and he had no personal interest in the criminal matter. RP 193, 195. He found no appearance of bias or prejudice. RP 196.

C. ARGUMENT

1. THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF BECAUSE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

The trial judge violated the appearance of fairness doctrine, the Code of Judicial Conduct, and due process in failing to recuse himself and order a new trial. Given the judge's participation in the dissolution proceedings, and the centrality of the conflict between Adler and her ex-husband to the charge in this case, a reasonable person could question the judge's ability to be fair and impartial.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. To protect this constitutional right, the Code of Judicial Conduct requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. CJC Canon 2, Rule 2.11(A). The canon recognizes that situations may arise where the appearance of fairness might be compromised by the judge's participation in the decision. State v. Carlson, 66 Wn. App. 909, 918-19, 833 P.2d 463 (1992), review denied, 120 Wn.2d 1022 (1993). As the United States Supreme Court has acknowledged, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136,

99 L. Ed. 942, 75 S. Ct. 623 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

“The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); see also State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) (“Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to its impartiality or fairness can be raised.”). The effect on the judicial system can be debilitating when “a trial judge’s decisions are tainted by even a mere suspicion of partiality.” Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995); Madry, 8 Wn. App. at 70 (“The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.”).

“Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased.” Tatham v. Rogers, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). While the judicial canon lists several circumstances under which a judge must recuse him or herself, “a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions ... apply.” CJC 2.11, Comment 1. A judge’s

failure to recuse himself when required to do so by the judicial canons is a violation of the appearance of fairness doctrine. Tatham, 170 Wn. App. at 94.

“In determining whether recusal is warranted, actual prejudice need not be proved; a ‘mere suspicion of partiality’ may be enough to warrant recusal.” State v. Davis, 175 Wn.2d 287, 306, 290 P.3d 43 (2012) (quoting Sherman, 128 Wn.2d at 205). “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 relevant facts.’” Sherman, 128 Wn.2d at 206. An appellate court reviews a trial judge’s decision on a recusal motion for abuse of discretion. Davis, 175 Wn.2d at 305.

In Sherman, a judge’s ex parte investigation prior to ruling on a motion to release records required recusal, even though appellants suffered no apparent prejudice. Because the judge may have inadvertently obtained information critical to a disputed issue, a reasonable person might question his impartiality, and recusal was necessary. Sherman, 128 Wn.2d at 206.

In this case, as in Sherman, Judge Evans’ participation in the dissolution proceedings prior to the criminal trial created an appearance of unfairness which required recusal. In hearing Adler’s motion to reopen

the GAL investigation in the dissolution case, the judge was exposed to allegations that Adler was acting deceitfully, “gaming the system,” and failing in her obligations. In denying her motion, the judge questioned Adler’s credibility, honesty, and tactics, commenting that she had engaged in “purposeful foot-dragging.” CP 16.

The animosity between the parties, evident in the dissolution hearing over which the judge presided, was a key component in the criminal case. Trevor’s allegations that Adler intended to use the insurance proceeds for purposes other than fixing the car were similar to his allegations in the dissolution hearing that she was “gaming the system.” Adler denied the allegations, and the court was called to resolve the dispute. Whether he intended to or not, the judge could have been influenced by the conclusions he had reached about Adler’s conduct in the dissolution proceedings when resolving the factual disputes in the criminal proceeding. A reasonable person, knowing about the judge’s previous exposure to Adler and her ex-husband, could reasonably question the judge’s impartiality. The court’s participation in the criminal case violated the appearance of fairness, and recusal was required.

2. IN THE EVENT THIS COURT DETERMINES THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED BECAUSE THE REQUEST FOR RECUSAL WAS UNTIMELY, ADLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Judge Evans stated it was important to his decision to deny the motion to recuse that it was not raised until after the trial was completed. RP 192-93. It is Adler's position that the appearance of fairness doctrine, the canons of judicial conduct, and due process required the judge to recuse himself at the time the issue was raised, rather than proceeding to enter findings of fact, conclusions of law, judgment and sentence in this matter. If this Court determines that Adler's request for recusal was untimely, then Adler received ineffective assistance of counsel.

Defense counsel was aware that Adler's dissolution case had dragged on for four years before it was final, and many judges in the county had heard matters in the dissolution action. He was also aware that a judge and a commissioner had already recused themselves in this case because of their involvement. Yet, when the criminal case was assigned to Judge Evans, counsel did not examine the file to determine if the judge had been involved in the dissolution case. RP 183. As Judge Evans pointed out, there was a week between the readiness hearing and the trial during which counsel could have filed a motion to recuse or an affidavit of prejudice. See RCW 4.12.050.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

In this case, defense counsel advised Adler to waive her right to a jury trial, believing that the judge who heard the bench trial would have no knowledge of her from the family law matter. RP 190. Given that advice, there was no legitimate excuse for counsel's failure to investigate Judge Evans' connection to the dissolution case prior to trial. Counsel is required to use due diligence to inform himself about any basis for a motion to recuse, and he must act promptly in bringing a recusal motion. Carlson, 66 Wn. App. at 916. Counsel's failure to do so in this case constitutes deficient performance. And because counsel did not act diligently, Adler lost her opportunity to file an affidavit of prejudice or seek recusal before trial. Counsel's deficient performance prejudiced Adler, and reversal is required.

D. CONCLUSION

Judge Evans erred in failing to recuse himself because his impartiality might reasonably be questioned, and trial counsel's lack of diligence in bringing the motion to recuse constituted ineffective assistance of counsel. This court should reverse Adler's conviction and remand for a new trial.

DATED February 10, 2015.

Respectfully submitted,



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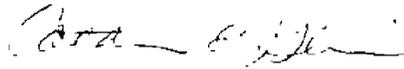
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Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Andrea Adler*, Cause No. 47366-6-II as follows:

Andrea Adler  
4054 Young Hill Lane SE  
Port Orchard, WA 98366

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
February 10, 2015

**GLINSKI LAW FIRM PLLC**

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