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Court of Appeals
Division II
State of Washington
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NO. 53814-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

CHARLES ANDREW STOCKER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The trial court was not required to recuse itself in this case.**
2. **Defense counsel was not ineffective for not directly objecting to the trial judge presiding over this matter.**
3. **The alleged conduct did not occur outside the applicable statute of limitations.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State accepts the Appellant's statement of the case with some supplemental citations included below.

ARGUMENT

1. **The trial court was not required to recuse itself in this case.**

The state agrees that a trial court's decision on whether or not to recuse is reviewed for an abuse of discretion. *State v. Leon*, 133 Wash.App. 810, 812; 138 P.3d 159 (2007). In *Leon*, the defendant pleaded guilty to premeditated first degree murder, and moved to withdraw his guilty plea based on the trial judge's failure to recuse himself. . *State v. Leon*, 133 Wash.App. at 812. This was based on the fact that one of the State's witnesses was an attorney that regularly appeared before the trial judge. *Id.* The judge noted that he was familiar with the witness, as was

every other Superior Court judge, and stated that he did not have any further relationship with the attorney. *Id.* The Court upheld the trial court's decision against recusal. *Id.* at 813.

A judge is presumed to perform his or her functions regularly and properly without bias or prejudice. *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945, review denied, 122 Wn.2d 1019 (1993). *See also In re Bochert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961) (bias or prejudice on the part of an elected judicial officer is never presumed).

Casual and nonspecific allegations of judicial bias do not provide a basis for recusal. *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987). Claims that the trial judge is prejudiced against the defendant based upon the trial judge having rendered prior rulings that were adverse to the defendant, whether in the same case or a different case, is insufficient to force recusal. *See generally, State v. Palmer*, 5 Wn. App. 405, 411, 487 P.2d 627 (1971); *See generally, Annot., Disqualification of Judge for Having Decided Different Case Against Litigant*, 21 A.L.R.3d 1369 (1968). This rule exists because the bias and prejudice necessary to disqualify a judge must generally come from an extra-judicial source. *See, e.g., State v. Thompson*, 150 Ariz. 554, 724 P.2d 1223, 1226 (1986); *United States v. Boffa*, 513 F. Supp. 505 (D.C. Del. 1981).

In the case at bar, akin to the judge in *Leon*, the trial judge did not have any “special relationship” with J.G. The trial court ruled that J.G.’s participation in drug court was not a basis for him to recuse himself. 4/22/19 RP at 4. The judge noted that he also sanctioned drug court participants if they were non-compliant, so his role could be positive or negative based upon the participant’s actions. 4/22/19 RP at 4. Further, the judge stated he would base his ruling “...upon the evidence and the law...[n]ot from anything that [he] might know about anybody else from outside the parameters of the case.” 4/22/19 RP at 5.

This was further affirmed at the trial. The Appellant does not cite to anything in the record that supports his claim that the judge used impermissible information to gauge the witness’s credibility. In fact, the judge specifically stated that his opinion was based upon “...listening and observing their testimony in **this courtroom in this case...**” RP at 483 (emphasis added).

Looking at J.G.’s testimony regarding the events at issue further supports the judge’s observation. From the transcript, J.G. openly testified about a number of personal matters, including marrying her youth pastor at 16, coming to Grays Harbor to be close to him when he was sent to prison, her criminal history, homelessness, and heroin addiction. RP at

163-64, 168-69. J.G. went on to describe trading sexual acts for special treatment from the Appellant. RP at 183-84.

The Appellant fails to overcome the presumption the judge performed his duties properly without bias or prejudice. There is no evidence that the judge had any extra-judicial contact with J.G. or that there was any appearance of such a special relationship. The judge in this case properly ruled against recusal.

2. Defense counsel was not ineffective for not objecting to the trial judge presiding over this matter.

In this case, the Appellant did not file a motion to disqualify the trial judge, nor did he take any action permitted by RCW 4.12.050. “[A] litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal.” *In re Welfare of Carpenter*, 21 Wash.App. 814, 820, 587 P.2d 588 (1978).

In the instant case, the fact that a key witness for the State was participating in drug court was fully disclosed by at least the April 22, 2019 hearing. 4/22/19 RP at 2-3. After listening to counsel, the trial court decided recusal was not mandated. *Id.* at 4. The Appellant’s retained attorney appeared to accept the judge’s statement that he would not use outside information to decide the case. At the April 22, 2019 hearing, Mr.

Johnston stated “We just wanted to bring it to your attention.” *Id.* In the intervening time between this hearing and trial, the Appellant did not file a motion to disqualify Judge Brown based upon him sitting as the drug court judge.

As the Appellant did not move to recuse the trial judge, nor did he object to the trial judge hearing this case, he has waived this issue on appeal. On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Chacon*, 192 Wn.2d 545, 547, 431 P.3d 477 (2018); RAP 2.5(a).

The Appellant attempts to avoid this waiver by couching the issue in terms of ineffective assistance of counsel. However, even under that analysis, his assertion fails.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). “Ineffective assistance of counsel is a fact-based determination...” *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wn.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts “review the entire record in determining whether a defendant received effective representation at trial.” *Id.*

Strickland explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

Trial counsel was in the best place to determine the trial judge’s demeanor in this case. He was also in the best position to assess the risks and benefits if the matter was transferred to another judge. As the Appellant was clearly aware of the fact that he now complains of, he made an informed decision to go forward in front of this judge. Just because the finding was adverse, it does not render it not a legitimate trial tactic. It certainly does not rise to the level of ineffective assistance of counsel.

The Appellant does not cite to anything in the record that indicates the judge used any improper basis to determine credibility. Despite repeatedly stating that “...the trial judge utilized his knowledge of the drug court and the alleged victim’s participation in it to find her ‘brutally honest’...” it is simply not supported by the record. Appellant’s Brief at 14.

As referenced above, the judge specifically indicated that his credibility determinations were based upon “...listening and observing their testimony in this courtroom in this case...” RP at 483. Trial counsel

was not ineffective, and the Appellant does not meet his burden on this issue.

3. The alleged conduct did not occur outside the applicable statute of limitations.

The State charged the Defendant with Custodial Sexual Misconduct in the First Degree alleging violations occurring between January 1, 2012, and February 28, 2016. The State filed the original Information on April 3, 2018. CP 12-14. Per RCW 9A.04.080, most felonies have a three year limitation on the initiation of proceedings. However, the allegations relevant to the Defendant have a ten-year limitation on the initiation of actions.

At the time of filing, RCW 9A.04.080(1)(b)(i)¹ provided a ten year limitation for “any felony committed by a public officer if the commission is in connection with the duties of his or her office or constitutes a breach of his or her public duty or a violation of the oath of office.” The Appellant, as a corrections officer for the City of Aberdeen, took an oath of office when he was hired. Exhibit 1. The conduct of the Appellant alleged in the Information and for which the Court found guilty would certainly constitute a felony committed by Mr. Stocker in connection with the duties of his or her office. Further, the custodial sexual misconduct

¹ This is now codified at RCW 9A.04.080(c)(1)

certainly “constitutes a breach of his or her public duty.”

The Appellant, as a corrections officer who has taken an oath of office is considered a, “public officer” by virtue of his employment. The Washington Court of Appeals in *State v. Cook*, found that a police officer who had taken an oath of office as part of his employment was a public officer and that conduct that he committed while off duty had a ten year statute of limitations for felonies. *State v. Cook*, 125 Wash.App 709, 106 P.3rd 251 (2005). The *Cook* court interpreted this statute at 9A.04.110(13), which defines, “public officer” as encompassing police officers. That statute defines public officers as a person holding an office under city, county, or state government who performs a public function and in doing so is vested with the exercise of some sovereign power of government. The statute also pertains to assistants, deputies, and employees of public officers. The *Cook* court upheld the decision in *State v. Austin* that found that a regularly appointed, constituted and “sworn police officer was a public officer within the meaning of the bribery statute.” *State v. Austin*, 65 Wash.2d 916, 923, 400 P.2d 603 (1965).

Police officers have also been found to be public officers when it pertains to exercising undue influence or graft, and other derelictions of their official duty. See *State v. Worsham*, 154 Wash. 575, 283 P. 167

(1929); *State v. Cooney*, 23 Wash.2d 539, 161 P.2d 442 (1945). All of these cases have to do with the dereliction of a peace officer's official duty, as is the case in the custodial sexual misconduct in the first degree.

The Appellant tries to distinguish the Appellant as a "peace officer" from a "public officer." Appellant's Brief at 12. However, even the case he cited refers to "peace officer[s]...and **other public officers.**" *State v. Zack*, 191 Wash 2d. 1011 (2018)(emphasis added). Therefore, it is a distinction without a difference. A peace officer would still be a "public officer" as contemplated in RCW 9A.04.080.

The statute of limitations for the crimes committed by the Appellant, by virtue of his employment as a corrections officer, the oath that he took, and the fact that the crime is done in connection with his duty of office or as a breach of his public duty gives the State ten years to bring forth the charges. For that reason, the Court properly exercised jurisdiction over the Appellant and this case, and the Appellant's assertion of a lack of jurisdiction should be denied.

CONCLUSION

The Appellant fails to meet his burden in this matter and the verdict of the trial court should be affirmed as imposed.

DATED this 25th day of July, 2020.

Respectfully Submitted,

BY: 
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GRAYS HARBOR CO PROS OFC

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