

NO. 79712-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

SCOTT CHAMBERLIN, Appellant.

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that could interfere with the timely resolution of cases.

## II. ISSUE PRESENTED

Whether a judge is automatically disqualified from hearing a case simply because he authorized a search warrant that produced the evidence that supports the charges?

## III. STATEMENT OF FACTS

The defendant, Scott Alan Chamberlin, was charged in Island County Superior Court with two drug offenses. CP 33. The evidence that supported the two counts was obtained pursuant to a search warrant. See generally CP 79-82.

Island County Superior Court is served by two locally elected judges. RCW 2.08.065. Chamberlin's matter was assigned to the Honorable Alan R. Hancock. Chamberlin orally objected to this assignment on the grounds that Judge Hancock had issued the search warrant that Chamberlin was

challenging. 1RP 3.<sup>1</sup> Judge Hancock indicated an initial inclination to deny the motion on the grounds that he was capable of fairly and impartially hearing any motion to suppress despite the fact that he issued the warrant. 1RP 5. He did, however, invite Chamberlin to present any legal argument to the contrary. 1RP 5-6.

On the day scheduled for the suppression hearing, Chamberlin renewed his concern that Judge Hancock should not hear the challenge to the search warrant that he had authorized, and asked that the matter be set over for additional briefing. 2RP 2. Judge Hancock refused to disqualify himself solely because he signed the search warrant, stating that judges are often asked to reconsider rulings they have made and that a judge should not recuse himself from a case without good cause. 2RP 6-7. Judge Hancock also noted that he had “no personal prejudice of any kind against Mr. Chamberlin, bias or prejudice,” 2RP 7, and stated that it was not too late for Chamberlin to file an affidavit of prejudice as a matter of right.<sup>2</sup> 2RP 5.

Chamberlin indicated that he did not want to “burn an affidavit at this point in time” because in a two judge county, he knew who would replace

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<sup>1</sup>There are four volumes of transcripts for this appeal. They will be cited as follows:

1RP	April 15, 2005
2RP	May 23, 2005
3RP	August 3, 2005
4RP	October 7, 2005

<sup>2</sup>See RCW 4.12.050.

Judge Hancock. 2RP 5-6, 9. Chamberlin requested, and was granted, a continuance to allow him to seek out authority to support his position. 2RP 11. Eventually, Chamberlin returned to Judge Hancock and indicated that he found absolutely no case law on point. 3RP 16.

Judge Hancock declined, once again, to recuse himself from the case, stating that

I know of no reason why I cannot be fair and impartial in this matter to the defendant, Mr. Chamberlin. I know of no reason where my impartiality might reasonably be questioned. Superior Court judges and other judges are called upon frequently to make decisions that implicate their prior decisions. One example is the one I've given before about deciding a motion for reconsideration. I have granted motions for reconsideration on occasion. I believe I'm usually correct, but on occasion I've granted a motion for reconsideration where I've determined that my prior decision was not correct legally or there's some other reason to change my decision. So I'm going to deny the motion.

I think it's important to note, too, in case I failed to indicate this previously, that judges have a duty to hear cases that they are capable of hearing and judges cannot ethically in my judgment duck an issue that the judge is required to hear. It would be easy for me to recuse myself, and then I wouldn't have to deal with these issues and shunt the case off to Judge Churchill and have her hear it, but if I have a duty to hear a matter and if no one has presented any reason why I should recuse myself from hearing a matter, then I think it's my duty as an elected public official to do my job and rule on this matter. So for all of these reasons, I will deny the motion to recuse myself and hear the motion.

3RP 19-20.

Chamberlin's motion to suppress was ultimately denied by Judge Hancock. CP 14-18. Chamberlin then submitted to a trial upon stipulated facts, which resulted in a conviction on one count and an acquittal on one count. 4RP 2, 9.

Chamberlin appealed his conviction to Division One of the Court of Appeals. In this appeal, Chamberlin challenged Judge Hancock's denial of his suppression motion and his denial of Chamberlin's motion to recuse himself. Chamberlin's appeal was ultimately transferred to this Court for resolution.

#### IV. ARGUMENT

##### A. A JUDGE MAY GENERALLY PRESIDE OVER A MATTER ABSENT BIAS OR PREJUDICE ARISING FROM AN EXTRA-JUDICIAL SOURCE

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). Compliance with RCW 4.12.050 will be sufficient to overcome the presumption that the judge is free from prejudice. State v. Belgarde, 119 Wn.2d 711, 715, 837 P.2d 599 (1992). But once a defendant disqualifies a judge as a matter of right pursuant to RCW 4.12.050, subsequent motions to disqualify the trial judge involve an

exercise of sound discretion in passing on the sufficiency of the showing made in support of the motion. State v. Palmer, 5 Wn. App. 405, 411-12, 487 P.2d 627, review denied, 79 Wn.2d 1012 (1971). This same rule applies to motions to disqualify a judge brought after the judge makes a discretionary ruling in an action or has presided over the trial. See, e.g., Belgarde, 119 Wn.2d at 715-17 (actual bias must be shown to disqualify a judge from presiding over a retrial following a reversal on appeal); Howland v. Day, 125 Wash. 480, 490-91, 216 P. 864 (1932) (actual bias must be shown to disqualify a judge from presiding over a motion for new trial); State v. Clemons, 56 Wn. App. 57, 782 P.2d 219 (1989), review denied, 114 Wn.2d 1005 (1990) (actual bias must be shown to disqualify a judge from presiding over a retrial following a mistrial). The trial court's decision on a nonmandatory disqualification motion must be upheld absent an abuse of discretion. Palmer, 5 Wn. App. at 411-12.

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, Palmer, 5 Wn. App. at 411; 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); Bussell v. Kentucky, 882 S.W.2d 111, 112 (Ky. 1994).

As noted by the Supreme Court,

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. . . . We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.

Withrow v. Larkin, 421 U.S. 35, 56-57, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1974).

B. THE MAJORITY RULE IS THAT A JUDGE WHO SIGNED A SEARCH WARRANT IS NOT DISQUALIFIED FROM HEARING THE CASE

Washington's appellate courts have never addressed whether a judge who issues a search warrant is automatically precluded from hearing any

criminal matter arising out of any search conducted pursuant to the search warrant. Under these circumstances, it is appropriate to review the rulings of other jurisdictions.

Over the last forty years, at least sixteen jurisdictions have rejected calls to adopt a per se rule that a judge is disqualified from presiding over a case in which he issued a search warrant. In 2003, the Alabama Court of Criminal Appeals held that a judge who signed a search warrant pursuant to which evidence against the defendant was obtained need only recuse himself from the defendant's criminal case upon a showing of actual bias. Ex parte Brooks, 855 So.2d 593 (Ala. Crim. App. 2003).

Arkansas has steadfastly refused to adopt the rule sought by Chamberlin, finding nothing in Arkansas Canon 3 of the Code of Judicial Conduct that would require a judge to recuse herself when, in the course of a suppression hearing to determine the validity of a search warrant, it becomes apparent that the judge would have to rule on the propriety of the warrant that she had earlier approved. Holloway v. State, 293 Ark. 438, 738 S.W.2d 796, 797-799 (1987); Gentry v. State, 47 Ark. App. 117, 886 S.W.2d 885, 886-87 (1994).

Connecticut held that allowing the judge who issued a search warrant to preside over a motion to suppress evidence collected pursuant to the warrant posed no serious detriment to the administration of justice. State v.

Toce, 6 Conn. Cir. Ct. 192, 269 A.2d 421, 422-23 (1969). The Florida Court of Appeals agreed, stating that “the case law of other states consistently permits a judge to handle a motion to suppress under these circumstances.” Cano v. State, 884 So.2d 131, 134 (Fla. App. 2004).

The Supreme Court of Indiana set out a clear rule in 1969:

The magistrate is a “neutral and detached magistrate” if at the time of the issuing of the warrant, he has no personal interest in the case other than that of performing the judicial duty of determining the presence of probable cause before issuing the warrant. Further, the mere fact that a judge has ruled upon a showing of probable cause does not necessarily disqualify that judge from trying that case on its merits.

State ex rel. French v. Hendricks Superior Court, 252 Ind. 213, 247 N.E.2d 519, 525 (1969). Kentucky implicitly adopted the same rule in Arnold v. Commonwealth, 421 S.W.2d 366 (Ky. App. 1967).

The Court of Special Appeals in Maryland in Trussell v. State, 67 Md. App. 23, 506 A.2d 255, 257 (1986), indicated that it could “find no dissenting voice from the broad consensus that a judge, in issuing a search warrant, is not thereby disqualified from presiding over the suppression hearing which will review that warrant.” The court went on to hold that the fact that a judge has issued a warrant does not disqualify that judge from presiding over a subsequent suppression hearing involving the validity of that warrant. Trussell, 506 A.2d at 258. This holding was subsequently extended to orders authorizing electronic surveillance. See Vandegrift v. State, 82 Md. App.

617, 573 A.2d 56, 62 (1990).

The Minnesota Court of Appeals gave short shrift to the argument that the judge who issued a search warrant could not preside over a motion to suppress evidence seized in execution of the warrant. In rejecting the requested per se rule, the court noted that the issuance of a search warrant may appear differently to the judge in the light of a comprehensive hearing. State v. Poole, 472 N.W.2d 195 (Minn. App. 1991).

The Superior Court of New Jersey agreed with the position taken by the Minnesota Court of Appeals, indicating that the judge who issued the warrant could preside over a motion to suppress evidence because

[t]he action in issuing the warrant is ex parte and merely appraises the prima facie showing of probable cause. The motion proceeding is adversarial and the judge adjudicates all questions of law and fact posed on the challenge of the validity of the warrant.

State v. Smith, 113 N.J. Super. 120, 273 A.2d 68, 78 (App. Div. 1971), certif. denied, 59 N.J. 293 (1971).

In People v. McCann, 85 N.Y.2d 951, 650 N.E.2d 853, 854, 626 N.Y.S.2d 1006 (1995), the Court of Appeals of New York held that it was not necessary for a judge who issued a warrant to recuse himself even from ruling on the motion to suppress evidence seized pursuant to that warrant. In so holding, the court stated that “[t]here is no basis to conclude that [Judges who review their own search warrants] fail to give suppression motions

anything less than fair and impartial consideration and further review is available by the Appellate Division which possesses the same power in such matters as does the suppression court.” McCann, 650 N.E.2d at 854, quoting People v. Tambe, 71 N.Y.2d 492, 504, 522 N.E.2d 448, 455, 527 N.Y.S.2d 372 (1988).

The North Carolina Court of Appeals found no statutory or constitutional proscription against a judge’s presiding at a hearing to review the validity of a search warrant issued by that judge. The court further found that North Carolina Canon 3(C)(1)(a) of the Code of Judicial Conduct did not require the judge to recuse himself. State v. Monserrate, 125 N.C. App. 22, 479 S.E.2d 494, 501-02 (1997). While the Supreme Court of North Dakota held that it was advisable for a different judge to consider a motion to suppress, no error occurs if the issuing judge decides the suppression motion absent a showing of bias by the judge. State v. Johnson, 590 N.W.2d 192, 196-97 (N.D. 1999).

South Dakota joined in the chorus of its sister states in 2004, holding that no implied bias can attach to a judge who merely reviewed an affidavit that was prepared outside of his presence to determine if legally, that affidavit established probable cause for the issuance of a warrant. The judge, therefore, may preside over a motion to suppress the evidence obtained pursuant to the search warrant absent proof of actual bias or prejudice.

Hirning v. Dooley, 679 N.W.2d 771, 779-782 (S.D. 2004).

In Hawkins v. State, 586 S.W.2d 465 (Tenn. 1979), the Tennessee Supreme Court held that the judge who issued the warrant is not disqualified from presiding over the suppression hearing or any subsequent proceedings involving the property or the accused persons. Texas reached the same result eleven years earlier in Irwin v. State, 441 S.W.2d 203, 209 (Tex. Crim. App. 1968). Accord Stokes v. State, 853 S.W.2d 227, 241-42 (Tex. App. 1993).

Finally, Wisconsin's Supreme Court has rejected the notion that a judge who issues a warrant must be disqualified from participation in any criminal proceeding arising out of the warrant. See Waupoose v. State, 46 Wis. 2d. 257, 174 N.W.2d 503 (1970).

Against this weight of authority, Chamberlin cites a single case from the Mississippi Court of Appeals. In Brent v. State, 929 So.2d 952 (Miss. Ct. App. 2005), cert. denied, 929 So.2d 923 (2006), the court held that the trial judge erred by denying the defendant's motion to recuse himself. The basis for recusal included: (1) the fact that the trial judge, while serving on an inferior court issued the search warrant that led to the defendant's indictment that brought the defendant before the judge in his current capacity; and (2) the judge had previously served as an assistant district attorney and in that role had prosecuted the defendant on an offense which was used to charge the

defendant as a habitual offender.<sup>3</sup> Brent, 929 So.2d at 955, ¶ 4. The Mississippi Court of Appeals, without discussing any of the adverse authority, adopted a per se rule of disqualification for any judge who issued a search warrant. Brent, 929 So.2d at 955, ¶ 6.

The social costs of the rule adopted in Brent are steep. In Washington, our state constitution directs that superior court judges be elected by the qualified electors of the county that they serve. Const. art. 4, § 5. These judges then presumably will preside over actions arising in that county absent statutory or constitutional grounds for their recusal. Adopting the automatic recusal rule requested by Chamberlin would unnecessarily deprive these counties of their elected judges.<sup>4</sup>

Every disqualification of a trial judge presents scheduling problems. These problems are exacerbated when a county must arrange for a visiting

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<sup>3</sup>Pre-existing Mississippi law appears to require recusal solely on the second ground. See Jenkins v. State, 570 So.2d 1191 (Miss. 1990).

<sup>4</sup>In those counties with three or fewer superior court judges, an automatic disqualification rule in search warrant cases could require many felonies to be tried before a visiting judge. This occurs because both the State and the defendant have the statutory right to also disqualify one judge. See RCW 4.12.050. Counties that would be adversely affected by this rule include those with one resident superior court judge (Douglas, Lincoln, Whitman, Adams, Jefferson, Asotin, Columbia, Garfield, Klickitat, Pacific, Wahkiakum, and Skamania), those with two resident superior court judges (Kittitas, Walla Walla, Mason, Ferry, Pend Oreille, Stevens, Island, San Juan, and Okanogan), and those with three resident superior court judges (Grays Harbor, Lewis, Whatcom, Grant, and Clallam). RCW 2.08.065; RCW 2.08.064; RCW 2.08.063; RCW 2.08.062.

judge.<sup>5</sup> While some accommodation has been made in the time for trial rules,<sup>6</sup> it is reasonable to expect that more charges will be dismissed with prejudice at a great societal cost if the minority rule is adopted.

Efforts undertaken by the prosecution to avoid this outcome, such as presenting more search warrants to district court judges, create their own problems. While superior court judges may issue search warrants for any location in the state, the authority of a district court judge does not appear to extend beyond the borders of the county. See, e.g., State v. Davidson, 26 Wn. App. 623, 613 P.2d 564, review granted, 94 Wn.2d 1020 (1980), review dismissed, 95 Wn.2d 1026 (1981). Thus, if an officer, acting pursuant to a prosecutor advisory that search warrants are to be referred to district court judges so that superior court judges will not be disqualified from presiding over the case, obtains a search warrant for a car that is ultimately located in the neighboring county, society will bear the cost of suppression without a commensurate increase in the fairness of the proceedings from the adoption of a per se disqualification rule.

The protection against any actual prejudice arising out of the conduct by the trial judge of the suppression hearing lies not in the blanket prohibition

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<sup>5</sup>The legislature has expressed its awareness of this by adopting special rules regarding the filing of an affidavit of prejudice in those counties with but one resident judge. See RCW 4.12.050.

<sup>6</sup>See CrR 3.3(e)(9).

proposed by Chamberlin, but, rather, in the utilization of existing means of challenging a perceived bias or other lack of fairness of the trial judge. First, a judge who feels he or she is biased has an obligation not to preside over the proceedings. Washington Canon 3(D) of the Code of Judicial Conduct. Second, if counsel conclude that a trial judge is for any reason biased, they may avail themselves of their remedies pursuant to RCW 4.12.050, RCW 4.12.030(4), and RCW 10.25.070.

Finally, further review of the search warrant is always available by the the appellate court. The appellate court will review the adequacy of the search warrant de novo, applying the same presumptions that the judge hearing the suppression motion applies. See, e.g., State v. Clark, 143 Wn.2d 731, 753, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001); State v. Nusbaum, 126 Wn. App. 160, 166-167, 107 P.3d 768 (2005). This later factor requires the affirmance of Chamberlin's conviction, assuming the adequacy of the search warrant, even if Judge Hancock should be found to have erroneously denied Chamberlin's unsupported motion to recuse.

## V. CONCLUSION

This Court should join the majority of states which have held that a trial court judge is not per se disqualified from presiding over criminal charges arising from evidence collected pursuant to a search warrant that was authorized by the trial court judge.

Respectfully submitted this 13th day of April, 2007.

Handwritten signature of Pamela Beth Loginsky in cursive script.

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