

NO. 70548-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IN RE MATTER OF: J.H.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in denying Josiah's Motion to Recuse. CP 30.

2. The trial court erred in entering Conclusion of Law No. 1: "Ethics advisory opinion 04-07, which refers to Judicial Information Systems (JIS) is also referring to Judicial Access Browsing System (JABS). CP 30.

3. The trial court erred in entering Conclusion of Law No. 2: "Because Ethics Advisory Opinion 04-07 is also referring to JABS (see conclusion #1), Ethics Advisory Opinion 04-07 controls in this case." CP 30.

4. The trial court erred in entering Conclusion of Law No. 3: "Informing both parties of the Commissioner's review of the ARY file prior to the capacity hearing, directives of Ethics Advisory Opinion 04-07 were followed." CP 30.

3. The trial court erred in entering Conclusion of Law No. 4: "There is no basis to recuse." CP 30.

4. The Superior Court erred in denying Joshiah's Motion to Revise. 5/9/13RP 3.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

Whether a juvenile court commissioner, on their own initiative, may seek out and read the sealed At-Risk Youth (ARY) file of a juvenile appearing before the court on an offender matter?

C. STATEMENT OF THE CASE.

Josiah Hummel was charged in Whatcom County Superior Court, Juvenile division, with assault in the fourth degree. Prior to Josiah making any court appearances on the matter, and before a date for a capacity hearing had been set, at an off the record meeting, attended by all parties, the trial court commissioner informed the parties that he had read Josiah's At-Risk Youth (ARY) file. CP 13; CP 30; 4/12/13RP 1-2.

Josiah filed a motion to recuse, attached as Appendix E, based on the Commissioner's ex parte investigation of Josiah's sealed ARY file. The Commissioner denied the motion to recuse relying on Ethics Advisory Opinion 04-07 and stating that "Counsel is now requesting that I recuse myself from the case for review of the ARY. Arguing in essence that a sealed ARY file is different than criminal history. This court disagrees. There is no basis to recuse." 4/12/13RP 6 ln 15-19

Josiah moved to revise. The Superior Court Judge denied Josiah's motion for revision and certified for discretionary review under RAP 2.3(b)(4). 5/21/13RP 3-4.

Josiah petitioned this court for discretionary review under RAP 2.3(b)(4). Discretionary review was granted. CP 49.

D. ARGUMENT.

I. The Court's Sua Sponte Review of Josiah's At-Risk Youth (ARY) File is Ex Parte Communication and Independent Investigation in Violation of the Code of Judicial Conduct Canons 2.9(A)(C) and 2.11.

Code of Judicial Conduct, Canon 1 requires that a judge shall act in a manner that promotes public confidence in the impartiality of the judiciary. CJC Canon 2.9(A), provides that "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court." Additionally, CJC 2.9(C) states that "A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law." Comment [6] goes on to state that "The prohibition against a judge

investigating the facts in a matter extends to information available in all mediums, including electronic.” The question is not whether such ex parte information was actually detrimental to the respondent, but rather the obtaining of ex parte information in and of itself.

The mere suspicion that a judge may consider information obtained ex parte when considering a case before that judge requires the judge recuse himself. *State v. Dominguez*, 81 Wn.App. 325, 328 (1996). CJC Canon 2.11(A).^{1 2} In *Sherman v. State* the Washington Supreme Court held that a judge should have recused himself from an action reviewing doctor’s termination from his job at a medical center for the doctor’s dependence on narcotics. The judge “directed his judicial intern to contact the WMTP [Washington Monitored Treatment Program] for general information about the process used to monitor recovering physicians.” *Sherman v. State*, 128 Wn.2d 164, 203 (1995).

¹ Current Canon 2.11(A) of the Code of Judicial Conduct states that “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances.” In the CJC Prior to January 1, 2011, a nearly identical provision was found in Canon 3(D)(1) “Judges should disqualify themselves in proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which.” The two are nearly identical, except that the current 2011 version replaces the permissive *should* with the required *shall*.

² *State v. Dominguez*, 81 Wn.App. 325, and every other case cited in this brief, was decided prior to the publication of the 2011 Code of Judicial Conduct. Therefore, all of these cases cite the old Canon 3(D)(1) (1994) of the Code of Judicial Conduct for disqualification.

The Washington Supreme Court found that by doing so the judge had violated Canon 3 of the Code of Judicial Conduct (CJC 1995), which forbids a judge from initiating or considering ex parte communications.

Sherman, 128 Wash.2d at 204-05. That canon reads in part:

Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding....

CJC Canon 3(A)(4) (1995). The comment to Canon 3 explains the prohibition against ex parte communications includes communicating with neutral third parties about a pending case:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and *other persons who are not participants in the proceeding*, except to the limited extent permitted....

CJC Canon 3(A)(4) cmt. (1995) (emphasis added).

The Washington Supreme Court reasoned that recusal of the judge in *Sherman* was appropriate. The court noted that a judge should recuse himself or herself where the appearance of impartiality is even possible:

The CJC 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.

Sherman, 128 Wn.2d at 205-06. In *Sherman*, recusal was appropriate because “a reasonable person might question [the judge’s] impartiality.”

Id.

Similarly, in *State v. Romano*, the court ordered the sentence reversed and remanded because the sentencing judge engaged in ex parte communication by calling two friends in an attempt to verify the defendant’s statements regarding his income. *State v. Romano*, 34 Wn.App. 567, 569 (1983). In *Romano*, the defendant entered guilty pleas to two counts of first degree theft. Before sentencing, the defendant testified that he worked as a jewelry salesman, that the work was seasonal, and that restitution payments would need to take into account that the majority of his annual income was received in November and December. *Id.*, at 568. After defendant’s testimony, but before sentencing, the judge inquired with at least two of his friends in the jewelry business to corroborate the defendant’s claims about seasonal income. The ex parte contacts were not revealed to the defendant until after sentencing. *Id.* The *Romano* court reversed and

remanded citing CJC 3(A)(4)(1995) and further stating that “the court should not conduct a personal investigation of the defendant and should avoid whenever possible receiving ex parte statements concerning the defendant.” *Id* at 568-569. The court did not make any finding of actual bias, rather it stated that “A careful search of records fails to reveal even the slightest hint that the judge acted in any other but a forthright and open manner. However, the conclusion is inescapable that the ex parte inquiry, to which defense was unable to respond, clouded the proceedings.” *Id* at 569.

In both *Sherman* and *Romano* the information obtained by the judges was not confidential information or even damaging; recusal in these cases was necessary not because of the content of the information, but because it was obtained ex parte upon the trial court’s own investigative initiative. *Sherman* at 205; *Romano* at 568.

Also, in comparison to the Canon 3 CJC (1995) under which *Sherman* was decided, Canon 2 of the current Code of Judicial Conduct is more clearly prohibitive of ex parte communication:

Rule 2.9. Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers,

concerning a pending or impending matter, before that judge's court except as follows...

(C) A judge shall not investigate facts in a matter pending or impending before the judge and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

In the case at hand, the commissioner engaged in ex parte communication and investigation by seeking out the confidential information contained in the Josiah's At-Risk Youth (ARY) file. CJC 2.9(A)(C); RCW 13.50.100 (2). Just like recusal was appropriate in *Sherman* because the judge obtained outside knowledge that might have influenced him, recusal is appropriate in this matter because the commissioner has outside knowledge that would lead a disinterested observer to question his impartiality.

During the pendency of this matter, the Washington Judicial Ethics Advisory Committee issued Ethics Advisory Opinion 13-07, Attached as Exhibit A, which concludes that "In summary, a judicial officer in a juvenile matter may not *sua sponte* review public and/or sealed records maintained in JABS unless such review is authorized by law, i.e., by statute, court rule, or case law." In its discussion, the committee appears to acknowledge that the conduct (*sua sponte* finding

and reviewing an ARY file) is per se ex parte communication and independent investigation. The committee's inquiry therefore focuses on whether said conduct falls within the "expressly authorized by law" [CJC 2.9(A)(5); 2.9(C)] exception to 2.9 which forbids ex parte communications. The committee states that "unless there is a specific statute, court rule, or case law allowing the judicial officer to consult the judicial information system, the prohibition of CJC 2.9(C) applies to all cases." *Id.* In this instance, where the juvenile is before the court on a pending offender matter, there is no statute, court rule, or case law authorizing the review of an ARY file; therefore, the commissioner's *sua sponte* review violates CJC 2.9(A)(C).

II. The Court's Sua Sponte Review of Josiah's ARY File Violates his Constitutional Right to Due Process and the Appearance of Fairness Doctrine

Due Process under the Fifth and Fourteenth Amendments to the United States Constitution requires, at its most basic level, a fair trial in front of an impartial magistrate, "but our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 135(1995). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received

a fair, impartial and neutral hearing.” *State v. Gamble*, 168 Wn.2d 161, 187 (2010). “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. 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 (1972). Some evidence of the judicial officer’s actual or potential bias must be shown for a claim to succeed under the appearance of fairness doctrine. *State v. Post*, 118 Wn.2d 596, 618-619 (1992).

The necessity of an impartial judge, as constitutionally guaranteed by due process and the appearance of fairness doctrine, is heightened in the context juvenile offender matter. Juvenile respondents do not have a right to a jury trial; therefore, the judicial officer is the ultimate trier of fact. However, juveniles appearing before a superior court commissioner, as in this case, are not afforded the same protections against bias as a similarly situated adult. Juveniles appearing before a superior court commissioner do not have the right to change of judicial officer via an affidavit of prejudice under RCW 4.12.050. *State v. Espinoza*, 112 Wn.2d 819, 826 (1989), and not all decisions are appealable as a matter of right.

In cases where the fundamental fairness doctrine is raised, courts consistently note other protections against judicial prejudice, namely RCW 4.12.050 and the requirements to recuse under the CJC, and expect defendants to take timely advantage of these options, rather than raising appearance of fairness claim after the fact. *See In re Swenson*, 158 Wn.App. 812, 820 (2010) *citing State v. Chamberlin*, 161 Wash.2d, 30, 39 (2007).

In this case the Commissioner's ex parte independent investigation into Josiah's ARY file is in and of itself evidence of potential bias. The reason the CJC 2.9(A)(C) prohibit ex parte communication and judicial investigation is due to concerns of judicial bias and impartiality. Josiah did make a timely motion for the commissioner to recuse himself, other protections, such as an affidavit of prejudice or an appeal of right were simply unavailable. These circumstances violate Josiah's due process right to an impartial judge and consequently violate the fundamental fairness doctrine.

E. CONCLUSION.

For the reasons stated above, Josiah respectfully asks this Court to remand this matter to a different judicial officer.

DATED this 27th day of January, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Danielle Walker', is written over a horizontal line.

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Exhibit A

State of Washington Ethics Advisory Committee

Opinion 13-07

The Ethics Advisory Committee (EAC) is appointed by the Chief Justice of the state Supreme Court under General Rule 10, and consists of judges from the Court of Appeals, superior court, courts of limited jurisdiction, an attorney, and the Administrator of the Courts. This is the designated body to advise judicial officers on the application of the Code of Judicial Conduct. The Ethics Advisory Committee issues formal advisory opinions that are circulated publicly by the Administrative Office of the Courts. The opinions are available at a searchable Web site at www.courts.wa.gov, under 'Programs and Organizations.'

STATE OF WASHINGTON
ETHICS ADVISORY COMMITTEE
OPINION 13-07

Questions

May a judicial officer in a juvenile matter, *sua sponte* or at the request of either party, review public and/or sealed records maintained in the Judicial Access Browser System (JABS)?

If the answer is yes, does CJC 2.9(C), prohibiting judicial officers from investigating facts in pending or impending matters, affect that review?

If review is permitted, what limitations apply to the review itself and to the judicial officer's description to counsel of the sealed materials the judicial officer has reviewed?

Do these considerations apply similarly to all juvenile proceedings including delinquency (offender) proceedings?

The court has questions about the application of EAC Opinion 04-07 http://www.courts.wa.gov/programs/orgs/pos/ethics/?fa=pos_ethics.dispopin&mode=0407 when a judicial officer is reviewing records maintained in the Judicial Access Browser System (JABS) to proceedings in juvenile court.

The court has stated that many of the juvenile files maintained in JABS (including offender, dependency, At Risk Youth and Child in Need of Services case files) are not generally available to the public. The court has also stated that judicial officers want to review these materials before hearing a matter, for pertinent background information. In those cases, the judicial officer advises both counsel of the documents reviewed and the information obtained, and gives both counsel the opportunity to respond.

The court notes that in many cases, the same judicial officer has heard some or all of the proceedings regarding a juvenile and knows the child's history and may have issued one or more of the orders maintained in JABS.

According to the JABS Online Manual, JABS uses a Web browser to display case history information on certain kinds of cases filed in superior, district, and municipal courts in this state. This same case history information is available by signing onto the JIS mainframe computer and viewing a variety of screens in both the JIS and SCOMIS applications.

The manual explains that JABS displays statewide case history and domestic violence case history for: 1) all criminal and infraction cases filed in district and municipal courts; 2) all criminal and juvenile offender cases filed in superior court; 3) superior court domestic, parentage, or dependency cases involving children or domestic violence; and 4) superior, district, and municipal civil cases involving domestic violence or unlawful harassment.

Answer

CJC 1.1 provides in part that a judge shall act in a manner that promotes public confidence in the impartiality of the judiciary and CJC 2.2 provides in part that a judicial officer shall perform all duties of judicial office fairly and impartially. The language in the Washington version of CJC 2.9(C) deviates from the language in the American Bar Association Model Code of Judicial Conduct. The Washington language provides that a judge shall not investigate facts in a matter pending before the judge and shall consider only the evidence presented and any facts that may be judicially noticed, *unless expressly authorized by law*. The language in the model Code does not contain the last phrase above and Comment 6 is the same in both versions.

The issue in this inquiry is whether a review by a judicial officer of a record that is sealed and generally unavailable to the public constitutes an ex parte communication, which is prohibited by CJC 2.9(C). Judicial officers who investigate the merits of matters that are before them by independently communicating with witnesses or by conducting reviews of matters in factual dispute violate this prohibition. Comment [6] makes it clear that this prohibition against a judge independently investigating facts extends to information available by electronic means.

Whether review of material maintained in JABS can be conducted, and the limitations that apply to the review and to the judicial officer's description to counsel, will depend upon the circumstances in each matter. CJC 2.9(C) permits a judicial officer to investigate facts only in situations where it is expressly authorized by law. Thus, as noted in EAC Opinion 04-07, a judicial officer may consider the Judicial Information System screen when setting conditions of release because CrR 3.2 and CrRLJ 3.2 provide that judicial officers must consider a variety of factors, including criminal history, when determining the release of the accused.

Another example of an express legal authorization to judicial officers to consult databases is RCW 26.09.182, which requires a judicial officer, before entering a permanent parenting plan, to "determine the existence of any information and proceedings relevant to the placement of the child that are available in the judicial

information system and databases.” These examples are not exhaustive; there may be other authority permitting the examination of the records in the database. However, unless there is a specific statute, court rule, or case law allowing the judicial officer to consult the judicial information system, the prohibition of CJC 2.9(C) applies to all cases.

In summary, a judicial officer in a juvenile matter may not *sua sponte* review public and /or sealed records maintained in JABS unless such review is authorized by law, i.e., by statute, court rule, or case law. If a party to a proceeding requests the court to review JABS records, but such review is not expressly authorized by law, then the court should allow the other party or parties to the case to be heard before deciding whether such review would be legally appropriate. The court should specifically describe the records that it has reviewed or will review, as opposed to generally stating that it will review JABS records. Following the court’s review, the court should describe the substance of such records.

Any review of JABS records conducted by the court should be limited to reviews expressly authorized by law or reviews conducted in accordance with the court’s decision after all parties to the case have had an opportunity to be heard. If the court has prior knowledge of material in JABS or other databases, and wishes to take judicial notice of such material in a particular case, the court should follow the procedure outlined in ER 201(e).

The court should advise the parties to the case of the material the court has reviewed from JABS or other databases.

These considerations apply to all juvenile proceedings, including delinquency (offender) proceedings.