Cite as 2010 Ark. App. 784

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 10-110

ROGER DALE RUDD APPELLANT	**Opinion Delivered** November 17, 2010
V.	APPEAL FROM THE JACKSON COUNTY CIRCUIT COURT [NOS. CR-05-245, CR-06-17]
STATE OF ARKANSAS APPELLEE	HONORABLE HAROLD S. ERWIN, JUDGE
	AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Roger Dale Rudd appeals a Jackson County Circuit Court order revoking his probation and sentencing him to twenty years' imprisonment in the Arkansas Department of Correction. For reversal, Rudd argues that the circuit court erred in denying his motion to recuse on the basis that the circuit court displayed a bias against appellant because of the court's relationship with appellant's fiancee. We affirm.

In 2006, appellant pled guilty to two counts of possession of methamphetamine with intent to deliver and one count of possession of drug paraphernalia with intent to manufacture and received five years' probation on each count. On several occasions from December 2007 to January 2009, appellant tested positive for methamphetamine and amphetamine and admitted to using these substances. Additionally, appellant failed to report to his supervising officer throughout the year of 2009. On November 17, 2009, when officers from the Jackson

County Sheriff's Department arrested appellant at his residence, they also found Danny Doss, a convicted felon, in appellant's company. During appellant's time at the Jackson County jail, appellant admitted to his use of marijuana and methamphetamine.

Based upon these violations, the State filed a petition for revocation. Prior to the revocation hearing on July 23, 2009, appellant's fiancee, Suzanne Goyne, notified the court clerk that appellant would be unable to attend. At the hearing, appellant's counsel informed the circuit court that appellant checked into a hospital in Jonesboro. In response, the prosecutor requested that the court issue a failure-to-appear warrant unless appellant could submit documentation of his hospitalization. The circuit court asked appellant's father, who attended the hearing, about the nature of Goyne's relationship with appellant. Appellant's father replied that they were "seeing" each other, and appellant's counsel explained that she and appellant were "dating." The circuit court then inquired whether the couple lived together, and appellant's father responded that the couple did not live together, that Goyne lived in Searcy, but that Goyne was "seeing" appellant. The circuit court granted the State's motion for a failure-to-appear warrant.

On October 27, 2009, appellant filed a motion to recuse, alleging that the trial judge personally knew Goyne's parents. At the hearing, appellant testified that he and Goyne were engaged while he served his probation. Appellant also testified that he understood that the trial judge was a friend of Goyne's parents, Barbara and David Bowman, and that the Bowmans "detest[ed]" his relationship with their daughter. Goyne testified that her parents knew the

trial judge but that she did not think that their acquaintance would make a difference in the court's decision. From the bench, the circuit court denied appellant's motion to recuse.

The court immediately proceeded to conduct appellant's probation revocation hearing. The court heard appellant's probation officer, Brandy Green, testify that she requested a petition to revoke appellant's probation because he tested positive and admitted to the use of methamphetamine on several occasions, failed to report numerous times, and initially failed to report to a group substance-abuse program. Green further testified that, when appellant was arrested, police found a convicted felon at the residence. The court also heard appellant testify and admit that he failed drug tests and used methamphetamine. At the conclusion of the hearing, the circuit court revoked appellant's probation solely on the two counts of possession of methamphetamine with intent to deliver and sentenced him to twenty years' imprisonment on each count to run concurrently in the Arkansas Department of Correction. Appellant timely filed his notice of appeal.

For the sole point on appeal, appellant argues that the circuit court erred in denying his motion to recuse because the circuit judge personally knew Goyne and her parents, who, according to appellant, objected to his relationship with their daughter. Appellant also claims that the circuit court showed a particular interest in the relationship between appellant and Goyne when the court inquired whether the couple lived together.

According to the Arkansas Constitution, article 7, section 20, as well as the Arkansas Code of Judicial Conduct, Canon 3(C),[1] judges must refrain from presiding over cases in which they might be interested and must avoid all appearances of bias. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). Under this canon, a judge must avoid not only impropriety, but the appearance of impropriety. *Bolden v. State*, 262 Ark. 718, 561 S.W.2d 281 (1978). When a judge exhibits bias, or the appearance of bias, by his or her conduct, comments, or display of irritation and impatience with the appellant, the appellate court will reverse. *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990). The supreme court has made it abundantly clear that, when remarks indicate that the judge is embroiled in a personal dispute, then the judge should recuse from the case. *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895 (1985).

Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966). The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2001). The mere fact of adverse rulings is not enough to demonstrate bias. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). A judge is not required to recuse because of his or her life experiences. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994). Further, there exists a presumption of impartiality. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

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[1] The current version of Canon 3(C) may be found at Ark. Code Jud. Conduct R. 2.11 (2010).

The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000). An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court, and the burden is on the party seeking to disqualify. *Turner*, *supra*. To decide whether there has been an abuse of discretion, we review the record to see if prejudice or bias was exhibited. *Reel*, *supra*.

Based upon our review of the record, we find nothing to indicate that the trial judge displayed prejudice or bias toward appellant. At the July 23, 2009 hearing, the trial judge inquired into the nature of appellant's relationship with Goyne and whether they were seeing each other, dating, or living together in Searcy. However, one condition of appellant's probation included notifying and seeking prior approval from his supervising officer when he "change[d] or stay[ed] away" from his residence. In light of this condition, the circuit court's inquiry into whether appellant lived with Goyne in Searcy appears entirely reasonable.

Appellant cites *Farley v. Jester*, 257 Ark. 686, 520 S.W.2d 200 (1975), for the proposition that the trial judge should have recused himself because he had a personal friendship with one of the witnesses. Here, the trial judge heard appellant's testimony that Goyne's parents detested him and that Goyne's parents were friends with the trial judge. However, Goyne's parents' feelings toward appellant, if true, are not imputed to the judge. Goyne herself testified that her parents knew the trial judge but that she believed that it would not make a difference in the disposition of appellant's case. Unlike *Farley*, *supra*, the trial judge in this instance did not have a personal friendship with a witness; rather, the judge only knew the witness's parents. *See also Kimbrough v. Kimbrough*, 83 Ark. App. 179, 119 S.W.3d 66

(2003) (holding that the trial judge was not required to recuse when appellant merely offered that the judge knew the Kimbrough family and expressed concern about the incapacitated person whose guardianship was at issue).

Further, appellant directs this court to certain remarks made during the probation hearing as evidence of the circuit judge's alleged bias. However, we do not discern any bias on the judge's part. In fact, the circuit judge stated at the hearing that, as the basis for his revocation, appellant had *twelve* violations, and the judge complimented appellant that he had "some good folks testifying for [him]." Contrary to appellant's assertions, these remarks display the judge's fairness and impartiality. Therefore, based upon our standard of review, we conclude that the trial judge did not abuse his discretion by denying appellant's motion to recuse.

Appellant also argues that he received a lengthy sentence from "an unfair and partial magistrate." First, appellant failed to make this argument below, and we cannot consider an issue that the circuit court did not have an opportunity to rule upon. *London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003). Second, if we were to reach the merits of appellant's argument, we note that the circuit court sentenced him to twenty years' imprisonment on the Y felonies, which are actually punishable by a term of up to forty years or life in prison on each count. *See* Ark. Code Ann. § 5-64-401(a)(1)(A)(i) (Supp. 2009). This sentence, of course, does not include the possession of drug paraphernalia conviction for which he could have received up to twenty years in prison. *See* Ark. Code Ann. § 5-4-401(3) (Repl. 2006) and

Ark. Code Ann. § 5-64-403(c)(5)(A) (Supp. 2009). For these reasons, appellant's argument is unavailing, and we affirm the circuit court's denial of appellant's motion to recuse.

Affirmed.

ABRAMSON and BROWN, JJ., agree.