

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON NEIL LUNDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51336

FILED

JAN 20 2009

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of felony driving under the influence. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge. The district court sentenced appellant Aaron Neil Lundy to serve a prison term of 3 to 12 years and ordered him to pay a \$2,000 fine.

Lundy presents two issues for our review. Both issues are based on the following sentencing colloquy, during which Lundy's prior convictions were being discussed:

THE COURT: Mr. Lundy received a sentence of five years, \$2,000 fine. It shows that he was represented by counsel.

MR. LOPEZ [Defense Counsel]: I have no objection to its use under the constitutional standards.

THE COURT: Mr. Gregory, I assume Mr. Jackson has had no involvement in this case?

MR. GREGORY [Prosecutor]: He has not. I have not spoken to him about the case at all.

MR. LOPEZ: Your, Honor, if I could have a moment to clarify that. Your Honor, we don't have any belief that Mark Jackson participated in any way in this case and we do not object to the District Attorney's office handling this prosecution, even though Mr. Jackson was previously his attorney.

THE COURT: Looking at the length of Mr. Lundy's record, I may very well have been involved in prior cases of his, too. I don't recall.

MR. LOPEZ: Mr. Lundy believes you were involved in at least some prior case and I would not object to you proceeding as Judge. He is in the belief there wouldn't be any conflict based on that.

THE COURT: A number of his offenses were in Douglas County back in the 80s. I was in the DA's office at that time.

First, Lundy contends that "[i]t was error for Judge Gibbons not to recuse himself from the instant criminal case once he became aware that he may have prosecuted Lundy in prior proceedings." Lundy claims that the Nevada Code of Judicial Conduct (NCJC) Canon 3E "requires a judge to disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including instances where the judge previously acted as a prosecutor against a criminal defendant now before the court on a similar criminal charge." Lundy asserts that, "[b]ecause Judge Gibbons did not follow the recommendation of the plea agreement, [he] believes that Judge Gibbons held a bias against him from that prior history of acting as a prosecutor against [him]." Lundy also asserts that Judge Gibbons erred by allowing him to waive "any conflict of interest or appearance of impropriety" arising from Judge Gibbons'

disclosure. Lundy seeks a new sentencing hearing before a different district judge.

“A judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification. Disqualification must be based on facts, rather than mere speculation.” Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (internal citations omitted). “[R]ecusal is mandatory in cases where the district court judge, prior to taking the bench, acted as an attorney in the case.” Turner v. State, 114 Nev. 682, 686, 962 P.2d 1223, 1225 (1998) (discussing the plain language of NCJC Canon 3E and NRS 1.230). “If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding.” NCJC Canon 3F.

Here, Lundy has not shown that District Judge Gibbons acted as an attorney in this case prior to taking the bench. The fact that District Judge Gibbons may have been involved in Lundy’s prior cases while he was employed by the Douglas County District Attorney’s Office and the fact that he chose not to follow the State’s sentencing recommendation do not demonstrate a bias towards Lundy. Lundy has not alleged any other basis for District Judge Gibbons’ disqualification. Accordingly, Lundy has not carried his burden to show that disqualification was warranted and we conclude that this contention is without merit.

Second, Lundy contends that “[i]t was error for the Douglas County District Attorney’s Office not to recuse itself from participation in the instant criminal case once it became aware that the District Attorney, Mark Jackson, had previously represented Lundy in the felony driving under the influence case used to enhance the instant matter.” Lundy cites to Brinkman v. State for the proposition that “[g]enerally, a prosecutor is disqualified from personally acting in a criminal case if he has previously represented the accused in the same or a similar matter.” 95 Nev. 220, 222, 592 P.2d 163, 164 (1979).

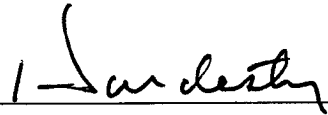
In Collier v. Legakes we held that “[t]he disqualification of a prosecutor’s office rests with the sound discretion of the district court. In exercising that discretion, the trial judge should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breach of any privileged communication.” 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982) (internal citations omitted).

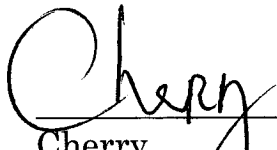
Here, the district court noted that District Attorney Mark Jackson had represented Lundy in his previous felony driving under the influence case and asked whether Mr. Jackson had any involvement in the instant case. The prosecutor responded that Mr. Jackson had no involvement in the case. Defense counsel stated that he did not believe that Mr. Jackson had participated in the case and that he did not object to the District Attorney’s Office handling the prosecution. Under these circumstances, the district court could reasonably determine that the District Attorney’s Office could prosecute the case impartially and without a breach of privileged communications. Accordingly, Lundy has not

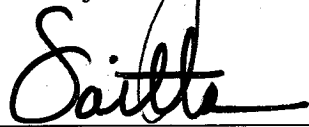
demonstrated that the district court abused its discretion by allowing the Douglas County District Attorney's Office to prosecute his case.

Having considered Lundy's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

, C.J.
Hardesty

, J.
Cherry

, J.
Saitta

cc: Hon. Michael P. Gibbons, District Judge
Derrick M. Lopez
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk