

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAY ALLEN WHARFF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72185

FILED

DEC 19 2018

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ray Allen Wharff appeals from a judgment of conviction, entered pursuant to a guilty plea, of felon in possession of a firearm. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Wharff claims the district court abused its discretion by denying his oral motion to disqualify where the district judge had prosecuted Wharff for an unrelated offense in 2003. Wharff argues the district judge had implied bias because he was going to sentence Wharff based on convictions for which the district judge previously prosecuted Wharff.

“[T]he test for whether a judge’s impartiality might reasonably be questioned is objective and presents a question of law [such that] this court will exercise its independent judgment of the undisputed facts.” *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (alterations in original, internal quotation marks and citations omitted). Disqualification is required when “a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge’s] impartiality.” *Id.*; see also NRS 1.230; *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 1905 (2016) (“The Court asks not whether a judge harbors an actual, subjective bias, but

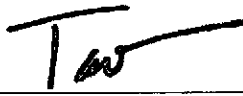
instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” (internal quotation marks omitted)). We presume a district judge is impartial, and therefore, Wharff has the burden of demonstrating disqualification was warranted. *See Ybarra*, 127 Nev. at 51, 247 P.3d at 272.

Wharff failed to demonstrate actual or implied bias on the part of the district court. *See Rippo v. Baker*, 580 U.S. ___, ___, 137 S. Ct. 905, 907 (2017) (“Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” (internal quotation marks omitted)). Here, the district judge stated it did not have any actual bias against Wharff. The district judge previously prosecuted Wharff more than ten years prior to this case. And the district judge was not an “attorney or counsel for either of the parties in the particular action or proceeding before the court.” *See* NRS 1.230(2)(c). Further, given the passage of time, Wharff failed to demonstrate the district judge would be biased at sentencing. Therefore, we conclude the district court was not required to recuse itself from presiding over this case. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.

Silver


_____, J.

Tao


_____, J.

Gibbons

cc: Hon. Jim C. Shirley, District Judge
Belanger & Plimpton
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk