IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MONICA TRUJILLO, DISTRICT JUDGE,
Respondents,
and
BRANDON ALEXANDER MCGUIRE,
Real Party in Interest.

No. 83269

FILED

SEP 13 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION TO DISQUALIFY

In this original petition for a writ of mandamus or prohibition, the State challenges a district court order in a criminal sexual assault case granting real party in interest Brandon Alexander McGuire's motion to preclude testimony from the alleged victim for failure to fully comply with NRS 174.234's notice requirements.

On July 27, 2021, a panel of this court directed an answer to the petition and temporarily granted the State's motion to stay the district court proceedings pending receipt and consideration of any opposition to the stay motion. McGuire then filed a motion to disqualify one of those panel members, Justice Douglas Herndon, under NRS 1.225 and NCJC 2.11(A), asserting that his impartiality could reasonably be questioned because he

presided, pretrial, over a separate homicide case against McGuire in which the underlying sexual assault case (which Justice Herndon never presided over) was noticed as an aggravator in the State's notice of intent to seek the death penalty. The State has filed an opposition to the motion to disqualify, and Justice Herndon has filed a response disclaiming any biases or prejudices in this matter. Having considered the parties' arguments, as well as Justice Herndon's response, we conclude that Justice Herndon's disqualification is not warranted.

NRS 1.225 calls for the disqualification of a justice for actual bias or prejudice, which is not claimed here, and for implied bias under certain conditions, none of which are asserted to apply here. NCJC 2.11(A) requires disqualification for implied bias more generally: at any time the justice's "impartiality might reasonably be questioned."[1] In evaluating impartiality, this court asks "whether a reasonable person, knowing all the facts, would harbor reasonable doubts." *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337, 341 (1995), *overruled on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 112 P.3d 1063 (2005). "[A] judge is presumed to be impartial, [and] the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (internal quotation marks

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[1]NCJC 2.11(A)(6)(d) requires recusal when a justice "previously presided as a judge over the matter in another court." The underlying sexual assault case was assigned to a different judge, and there is no allegation that Justice Herndon ever presided over that matter in the district court.

omitted). A judge has a duty to sit in the absence of disqualifying bias, and the judge's determination that he should not voluntarily disqualify himself is entitled to substantial weight. *Berosini*, 111 Nev. at 437, 894 P.2d at 341.

Before becoming a supreme court justice, Justice Herndon presided, pretrial, over a separate and unrelated criminal case in which McGuire is the defendant. This alone is not a disqualifying act, and McGuire has not asserted or demonstrated any facts supporting the conclusion that a reasonable person would harbor doubts as to Justice Herndon's impartiality under these circumstances. *See generally McTurner v. McTurner*, 649 So. 2d 1, 7 (La. Ct. App. 1994), *on rehearing* (determining that no appearance of impropriety existed where a judge of an appellate court panel decided an appeal arising from the same case in which he had previously entered a stipulated judgment bearing no effect on the appeal); *Commw. v. Dane Ent. Servs., Inc.*, 467 N.E.2d 222, 225 (Mass. App. Ct. 1984) ("That a judge presided in a previous criminal trial involving the same defendant is generally not a ground for disqualification."); *State v. Reid*, 213 S.W.3d 792, 815 (Tenn. 2006) (explaining that "[a] trial judge is not disqualified because that judge has previously presided over legal proceedings involving the same defendant. . . . [K]nowledge of facts about the case is not sufficient in and of itself to require disqualification" (internal citations omitted)); *State v. Henley*, 778 N.W.2d 853, 857 (Wis. 2010) (a supreme court justice who had previously participated on a court of appeals panel that decided a direct appeal involving the respondent's codefendant declined to recuse, under Wisconsin's disqualification and appearance of impropriety rules, from participating in the State's appeal from an order

granting the respondent a new trial). Accordingly, we deny the motion to disqualify Justice Herndon.

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

cc: Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender