94-522

Judicial Inquiry Commission

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May 13, 1994

This is in response to your request for an advisory opinion from the Judicial Inquiry Commission.

In answer to your first question, the rule in Alabama is that the motion to recuse should be heard by the challenged judge and that judge is not required to assign the motion to another judge. "The motion to recuse must be addressed to the judge challenged." Slinker v. State, 344 So.2d 1264, 1268 (Ala.Cr.App. 1977). See also Moreland v. State, 469 So. 2d 1305 (Ala.Crim.App.), cert. denied, 469 So. 2d 1305 (Ala. 1985). "Upon the trial judge himself devolves, in the first instance, the determination of the question of his own competency; his action, if erroneous, being subject to be controlled by mandamus seasonably applied for." Ex parte Dew, 7 Ala.App. 437, 442, 62 So. 261 (1913). See also Ex parte Duncan, [Ms. 1921874, January 21, 1994, opinion modified on rehearing March 4, 1994] ___ So.2d ___ (Ala. 1994).

There are essentially four grounds alleged in the motion to recuse.

1) The defendant alleges that you have a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.

2) You served as an assistant district attorney when the defendant was first tried.

3) As an assistant district attorney, you worked closely with three investigators for the district attorney's office who are material witnesses in the prosecution of the defendant.

4) The prosecutrix (the daughter of the deceased victim) is a material witness in this case and was an employee of the district attorney's office during the time of your service as assistant district attorney.

    1. The fact that you dismissed the defendant's divorce action does not constitute a basis for your disqualification in the defendant's criminal prosecution. The defendant was first tried and convicted of manslaughter by another judge. That conviction was reversed on appeal "because the trial court had compelled the (defendant's wife to testify against the [defendant] despite the invocation by the wife of her spousal privilege not to testify and the [defendant]'s objections."

Ziglar v. State, [Ms. CR 90-1321, July 9, 1993) __ So.2d ___ (Ala.Cr.App. 1993) (on application for rehearing).

After becoming a circuit judge in January of 1993, you "inherited" the defendant's pending divorce action. You dismissed that case for lack of prosecution.

Your dismissal of the defendant's divorce action does not require your disqualification in presiding over the defendant's trial for manslaughter.

> "'Knowledge gained from the trial of one case does not disqualify a judge from hearing another case involving the same parties.' Advisory Opinion 89-375, citing Hartment v. Board of Trustees, 436 So.2d 837 (Ala. 1983). 'The rule against prior personal knowledge only applies to knowledge garnered from extrajudicial sources. Knowledge about matters in a proceeding that has been obtained by a judge within the proceeding itself or within another legal proceeding is permissible and does not call for disqualification.' J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics § 5.11 at 115 (1990). Under the 'extrajudicial source rule,' 'that a judge presided in a previous criminal trial is generally not a ground for disqualification in a subsequent trial involving the same defendant, because the source of any opinion the judge might hold about the defendant is not extrajudicial.' Judicial Conduct at § 5.05 at 106. See Lindsey v. Lindsey, 229 Ala. 578, 580, 158 So. 522 (1934) ('It is very properly admitted that the mere fact of hearing the evidence and rendering a decision adverse to appellant in the former proceeding would not disqualify the judge to try this case involving the same issue of fact.'). See also Advisory Opinion 89-350." Advisory Opinions 93-510, 93-503.

The fact that a judge presided over the defendant's criminal trial does not automatically disqualify the judge from presiding over a civil trial involving similar issues and the same defendant. Advisory Opinion 93-510. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and must result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." Kitchens v. Maye, 623 So.2d 1083 (Ala. 1993). You specifically state that you have no personal knowledge of any disputed evidentiary facts concerning the criminal proceedings.

2. Your prior service as an assistant district attorney does not constitute a basis for your disqualification. You served as a part-time assistant district attorney form 1977 until 1989. You became a full-time assistant district attorney in 1989 and served in that position until 1993. You state that you "have no knowledge or recollection of ever having been involved in any manner in the

prosecution of the defendant. The mere fact that you were an assistant district attorney when the defendant was first tried does not require your recusal where you did not participate in that first trial. "'If the judge did not participate in the investigation, preparation, or presentation of the case, the mere fact that he was in the office of the district attorney has been held not to be grounds for disqualification.'" Advisory Opinion 92-460. See also James v. State, 423 So. 2d 339 (Ala.Cr.App. 1982) ("the trial judge" representation of defendant in a previous criminal case while the case was on appeal did not per se furnish a valid ground for a recusal"); Advisory Opinion 91-422 (A judge is not disqualified from hearing a divorce case in which years earlier, the judge as an assistant district attorney prosecuted one of the parties in a child support action); Advisory Opinion 86-259 (A judge is not disqualified from sitting in a criminal case in which the defendant was arrested while the judge was serving as an assistant district attorney but did not participate in the arrest).

3. Your relationship as an assistant district attorney with the three investigators who will be material witnesses at the defendant's trial does not constitute a ground for your disqualification. Your former professional or social relationship with those investigators does not automatically require your recusal in any case in which they will appear as witnesses.

"'Whether or not disqualification is required when a friend appears as a party to a suit before a judge depends on how personal the relationship is between the judge and the party.' J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics § 5.15 at 125 (1990). See advisory opinions 81-99; 83-183.

'The bias or prejudice which has to be shown before a judge is disqualified must be "personal" bias, and not "judicial" bias. Personal bias, as contrasted with judicial, is an attitude of extra-judicial origin, or one derived non coram judice. In re White, 53 Ala. App. 377, 300 So.2d 420 (1977). The fact that one of the parties before the court is known to and thought well of by the judge is not sufficient to show bias. Duncan v. Sherrill, 341 So.2d 946 (Ala. 1977).'

McMurphy v. State, 455 So.2d , 924, 929 (Ala.Cr.App. 1984). '[I]t is an inescapable fact of life that judges serving throughout the state will necessarily have had associations and friendships with parties coming before their courts. A judge should not be subject to disqualification for

> trial judge and victim knew each other and possibly enjoyed a friendship both professionally and socially is not reason enough to require the judge to recuse himself')."

Advisory Opinion 93-510. Your disqualification would be required if, for any reason including your past professional or social relationship with the investigators, you had a personal bias or prejudice concerning those individuals. Canon 3C(l)(a), Alabama Canons of Judicial Ethics. However, you state that you "have had occasions in different cases to receive testimony from them and have not had any problem with evaluating their credibility as [you] would any other witness."

4. The fact that the prosecutrix (the daughter of the deceased victim) is a material witness in the prosecution of the defendant and was an employee of the district attorney's office during the time of your service as assistant district attorney does not constitute a ground for your disqualification. You state that you "have not had contact with the person concerning this case," and there appears to be no personal bias or prejudice concerning the prosecutrix which would require your disqualification under Canon 3C(l)(a).

This Commission has reviewed the allegations contained in the motion to recuse; your response contained in your letter of April 12, 1994, requesting this opinion; and the attached transcript of the hearing held on April 7, 1994. It is the opinion of this Commission that you are not disqualified from presiding over the defendant's criminal trial. We find that there is no appearance of impropriety under Canon 2, and that there is no basis upon which your impartiality might reasonably be questioned under Canon 3C.

This advisory opinion has been reviewed by the entire Commission and is the opinion of the Commission.