SUPREME COURT OF ARKANSAS

No. CR-17-1003

KENNETH R. ISOM APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 20, 2018 APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. CR-2001-52-1] HONORABLE SAM B. POPE, JUDGE DISSENTING OPINION.

JOSEPHINE LINKER HART, Justice

The circuit judge's refusal to recuse in this case should be reversed. Not only is there an obvious appearance of impropriety, there was strong circumstantial evidence of actual bias in the circuit judge's prior dealings with Mr. Isom. I cannot overlook that all of the so-called "discretionary" calls discussed in the majority opinion, as well as the lack of judicial temperament by the circuit judge, seem to substantiate the allegation of bias made before the hearing. Accordingly, a new hearing should be ordered.

The majority's *finding* that "Based on our review of the letters, we conclude that Prosecutor Pope was carrying out his ordinary duties as a prosecutor when he contacted the governor's office about Isom's parole eligibility" is simply wrong. The majority's conclusion is unsupported by either law or fact.

Factually, the majority's *finding* that "it appears that the notice of the possibility fo parole for Isom was received by a sheriff rather than by Prosecutor Pope," is pure speculation

and not even suggested by Judge Pope when he denied Mr. Isom's recusal motion. Further, a letter, signed by "Jack Gillean, Executive Assistant for Criminal Justice," indicates that Prosecutor Pope *was* notified of Mr. Isom's pending parole hearing. The letter states,

> On March 14, 1994, I received a letter from Mr. Norris which I have attached for your review. Mr. Norris informed me that notifications were forwarded to the persons named in the letter. Mr. Pope's name was among those listed. In addition, as noted in the letter, responses were returned by Drew and Jefferson counties; however, Sheriff Jay Winter responded "no" to the release on the Drew County prosecuting attorney's form.

Accordingly, there is no factual basis for the majority's conclusion that Prosecutor Pope was "carrying out his ordinary duties" when he made his extraordinary trip to Little Rock.

There is also no legal basis to support the majority's *finding* that Prosecutor Pope was "carrying out his ordinary duties." The State argues that Arkansas Code Annotated section 16-93-702(a) makes Prosecutor Pope's extraordinary trip to Little Rock as part of his statutory duties. However, a prosecutor's input is solicited "[b]efore the parole board shall grant any parole." *Id.* Obviously, *before* the parole board shall grant any parole does not mean *after* the parole board has made its decision. As Chief Justice Kemp noted in *City of North Little Rock v. Pfeifer*, 2017 Ark. 113, 515 S.W.3d 593, "The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." Section 16-93-702(a) does not require a prosecutor to travel to Little Rock to use the power of his office to attempt to persuade the governor to annul a decision by the parole board. Accordingly, Prosecutor Pope's extraordinary efforts to reverse Mr. Isom's lawfully granted parole can only be attributed to

some special animus that Prosecutor Pope held toward Mr. Isom.

Further, while I am mindful that a trial judge's previous prosecution of a defendant is insufficient under Arkansas law to require recusal, the circumstances of Judge Pope's prior involvement with Mr. Isom as a prosecutor are remarkable. Before successfully winning a conviction against Mr. Isom in the case that resulted in Prosecutor Pope's extraordinary efforts to get the governor to annul a lawful decision by the parole board, Prosecutor Pope twice failed. Acquittals in criminal trials are not common in Arkansas; a defendant's acquittal in two separate criminal trials is obviously even rarer. I decline to speculate whether these rare failures instilled in Prosecutor Pope an animus toward Mr. Isom, or whether a preexisting animus caused Prosecutor Pope to twice take Mr. Isom to trial without sufficient evidence. I am certain, however, that Judge Pope's prior dealings with Mr. Isom, including his extraordinary efforts to get the governor to annul a lawful decision by the parole board, made him especially familiar with Mr. Isom.

That familiarity with Mr. Isom continued when Judge Pope ascended to the bench. Judge Pope presided over Mr. Isom's criminal trial, which included the ruling on Mr. Isom's motion to suppress an identification made by Dorothy Lawson. Significantly, Judge Pope ruled that the photo array the police showed to Ms. Lawson was not unduly suggestive even though Mr. Isom was the only man in the array photos who did not have facial hair. Judge Pope also presided over Mr. Isom's Rule 37 hearing, and he denied Mr. Isom post-conviction relief.

It is standard practice in Arkansas for a circuit judge to preside over both the criminal

trial and postconviction proceedings. As any reasonable person would recognize, inherent in this situation is a bias against a criminal defendant receiving postconviction relief because the circuit judge is responsible for ensuring that a criminal defendant receives a fair trial. Accordingly, in a Rule 37 hearing, the circuit judge is permitted to give himself his own report card. Due process would be better served if a judge who was not involved in the trial of the substantive charge would conduct the Rule 37 hearing.

However, the case before us presents an even more compelling reason why the judge who presided over the criminal trial and Rule 37 hearing should not preside over further proceedings. It involves a rare grant of permission for an inmate to pursue a writ of error coram nobis, as well as some highly unusual issues, the compelling state interest in avoiding the appearance of impropriety dictates that another judge be tasked with presiding. One of the issues that Mr. Isom raises concerns Ms. Lawson's identification of Mr. Isom on the photo array that the police presented to her at the hospital. Judge Pope was the finder of fact on the issue of whether the identification should have been suppressed. Judge Pope allowed himself to be placed in an untenable position. The hearing in large part concerned *his* decision, not as just a referee but also as *the* finder of fact. No member of the judiciary should have been placed in that position—the appearance of bias in this situation is impossible to avoid. That was exactly the situation in *Ferguson v. State*, 2016 Ark. 319, 498 S.W.3d 733, in which we reversed a circuit judges decision to sit on a case where her "impartiality might reasonably be questioned." Given the unique history of this case and the issues to be tried, Judge Pope's impartiality could reasonably be questioned.

Judge Pope's handling of the trial certainly did nothing to dispel questions of his impartiality. When Mr. Isom sought discovery as a means of uncovering some objective evidence to help determine which version of Frank Spain's testimony was closest to the truth, Judge Pope acted as an advocate *opposed* to Mr. Isom, not a neutral arbiter. As the majority notes, Judge Pope threatened Mr. Isom's attorney with Rule 11 sanctions in his written order:

> Mr. Isom has made some serious allegations against the State which if true would constitute violations of the state's obligations under Brady v. Maryland. Rule 3.1 Arkansas Rules of Professional Conduct provide that a lawyer may only bring assertions on an issue if there is a factual reason to do so. Additionally, by reference only, Arkansas Rule of Civil Procedure, Rule 11(b)(3) requires a lawyer's signature on a pleading be based on a reasonable inquiry that the factual contentions in a pleading have evidentiary support.

The majority is correct when it opines that "[h]ere, counsel appeared to be doing her job, and the judge's reference to sanctions was not warranted." Inexplicably, the majority does not believe that such an intemperate and gratuitous threat "showed hostility" that requires recusal.

Likewise, Judge Pope's demonstrated what could reasonably be interpreted as a lack of impartiality—or outright bias—when Mr. Isom's counsel attempted to question Officer Rick McKelvey about whether scissors, suspected to be the murder weapon, had been recovered during a search. Initially, Officer McKelvey appeared to recall such an event but became confused during his testimony.

> Q: During the course of your investigation into the Burton homicide, did you go on a search for a weapon with an inmate from the Drew County Detention Center?

A: We—I recall a search warrant being executed at someone's house. And I do believe there might have been a pair of scissors recovered from that search warrant.

Q: And then you recall a separate search that occurred with an inmate from the detention center where you recovered a pair or two pairs of scissors?

A: I don't—I don't recall how many were recovered, but I do recall there, as a result of a search warrant, there was one or two pairs of scissors.

Q: And in addition, to those four, you testified that you went on a search with an inmate from the Drew County Detention Center at a house and there were a number of scissors located, one or more. Correct?

A: That's correct.

However, Judge Pope interjected, asserting that Officer McKelvey's answers could be explained because "Mr. McKelvey has hearing problems sometimes." If Officer McKelvey's hearing was really a matter of concern, a reasonable person would expect a circuit judge to do nothing more than say, "Speak up counselor." Instead, Judge Pope declared a recess. I cannot fail to notice that after the break, the State recalled Officer McKelvey, who testified that his prior testimony was mistaken, he had misspoken earlier, and on further questioning repeatedly expressed inability to hear the questions from Mr. Isom's counsel. When a circuit judge, sitting as the finder of fact, takes it upon himself to rehabilitate a witness and then orders a recess that could reasonably be interpreted as giving the State a chance to wood-shed that witness, the judge's impartiality might reasonably be questioned.

Given the appearance of bias, if not the actual bias, and ample reason to question the impartiality of Judge Pope, all the close "discretionary" calls that he made must be

questioned. Credibility determinations and the weight to be assigned conflicting evidence determined all the substantive issues in this case. This included an interpretation of and all assignment of weight to Nurse Wexley's notes regarding Ms. Lawson's "attempt" to make a photo identification of Mr. Isom at the hospital, which related to whether the State committed a *Brady* violation; inconsistencies in Woodward's testimony concerning the photo array; and whether Frank Spain was lying in the pretrial hearing or the Rule 37 hearing with regard to the scissors that were believed to be the murder weapon.

Resolving the question of what was behind Spain's inconsistent testimony was the principle reason why this court granted Mr. Isom permission to seek a writ of error coram nobis in the first place. Yet, as the majority notes, Judge Pope severely limited discovery and improperly threatened Mr. Isom's counsel with Rule 11 sanctions when she sought to uncover evidence that would be more substantive than Spain's self-serving explanation of why his testimony in the pretrial hearing and the Rule 37 hearing are irreconcilable.

When this court reviews a decision rendered by a lower tribunal, we grant great deference to the finder of fact to resolve questions of witness credibility and the weight to be afforded conflicting pieces of evidence. However, when this deference rests on a foundation of actual or perceived bias and lack of impartiality, the legitimacy of the decision crumbles under even the most cursory scrutiny. I would reverse Judge Pope's decision not to recuse and order a new hearing by a new judge.

I respectfully dissent.