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**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

ALLEN DEAN O'BRYANT,)
Petitioner,) MAR 22 2023
v.) JOHN D. HADDEN
STATE OF OKLAHOMA,) CLERK
Respondent.) No. PC-2023-50

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Petitioner, pro se, appeals the denial of post-conviction relief by District Court of Oklahoma County in Case No. CF-2015-7659. Following a jury trial, Petitioner was convicted of four counts of Sexual Abuse of a Child and sentenced to life imprisonment on each count. The sentences were ordered to be served consecutively. This Court affirmed Petitioner's Judgment and Sentence on direct appeal. *O'Bryant v. State*, No. F-2018-294 (Okl. Cr. August 29, 2019)(not for publication).

On October 20, 2022, Petitioner filed his original application for post-conviction relief in the trial court raising judicial bias. In a thorough order filed on November 21, 2022, the Honorable Cindy H.

Truong, District Judge, found Petitioner was not entitled to post-conviction relief.

We review the District Court's determination for an abuse of discretion. *State ex rel. Smith v. Neuwirth*, 2014 OK CR 16, ¶ 12, 337 P.3d 763, 766. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Petitioner's proposition of error is based on the sexual misconduct of his trial judge, then-District Judge Timothy Henderson. In her order denying relief, Judge Truong found Petitioner failed to overcome the presumption of impartiality. We agree.

The Oklahoma Constitution guarantees a defendant a right to a fair, impartial trial not tainted by the personal bias or prejudice of the trial court. Okla. Const. art.2, § 6. "There is a general presumption of impartiality on the part of judges as to matters before them." *Fields v. State*, 1996 OK CR 35, 923 P.2d 624, 636. Due process is violated by

actual bias or “an unconstitutional ‘potential for bias.’” *Fort v. State*, 2022 OK CR 12, ¶ 12, 516 P.3d 690, 694.

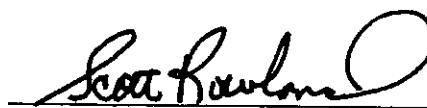
This Court has held that a sexual relationship between the trial judge and the prosecuting attorney violates the due process. *Id.* at ¶ 13. However, Petitioner has presented no evidence indicating an improper relationship between the trial judge and the prosecutors in his case. To the contrary, the District Court had before it Affidavits from both prosecuting attorneys denying the existence of such a relationship. Petitioner has failed to establish he is entitled to relief. Therefore, the District Court’s order denying post-conviction relief is **AFFIRMED**. Petitioner’s Motion to Supplement the Record and Motion for Appointment of Counsel, which were filed with this Court’s Clerk on February 15, 2023, are **MOOT**, as a result they are **DENIED**.

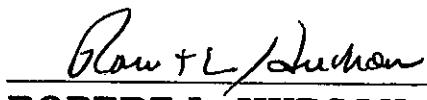
Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2023), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

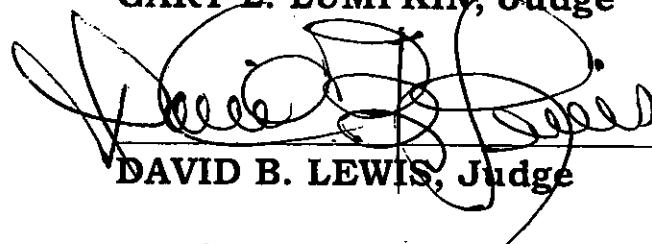
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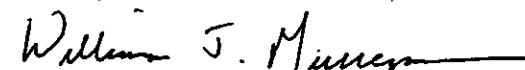
22nd day of March, 2023.


SCOTT ROWLAND, Presiding Judge


ROBERT L. HUDSON, Vice Presiding Judge


GARY L. LUMPKIN, Judge


DAVID B. LEWIS, Judge


WILLIAM J. MUSSEMAN, Judge

ATTEST:

John D. Hadden

Clerk
PA

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

NOV 21 2022

ALEN DEAN O'BRYANT,

RICK WARREN
COURT CLERK

Petitioner,

38

v.

) Case No. CF-2015-7659

THE STATE OF OKLAHOMA,

Respondent.

)

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

This matter comes on for consideration of Petitioner's Application for Post-Conviction Relief filed in the above-referenced case and the State's Response thereto, and the Court being fully advised finds as follows:

MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials in reaching its decision: the Petitioner's Application for Post-Conviction Relief, filed October 20, 2022; Petitioner's Motion to Stay Post-Conviction Proceedings, the State's Response to Application for Post-Conviction Relief and attachments thereto; and the State's Response to Petitioner's Motion to Stay Post-Conviction Proceedings.

PROCEDURAL HISTORY

Petitioner was tried by jury between the 22nd and 25th days of January 2018. *See State's Exhibit 1, Docket Sheet.* Assistant District Attorneys Ryan Stephenson and Kate Brandon prosecuted the case. *Id.* Petitioner was represented by retained counsel, David Smith and Elliott Crawford. *Id.* The Honorable Cindy H. Truong assigned the matter to Oklahoma County District Judge Timothy R. Henderson for trial. *Id.* Ultimately, the jury convicted Petitioner of Sexual Abuse of a Child (Counts 1-4) and sentenced him to imprisonment for life and a \$500.00 fine in each count. *See State's Exhibit 2, Summary Opinion F-2018-294.* Judge Henderson pronounced the judgment and sentence and ordered the sentences to run consecutively with credit for time served. *Id.*

Petitioner perfected an appeal from the jury's decision. *Id.* He raised the following propositions of error:

1. Mr. O'Bryant was denied effective assistance of counsel in violation of his federal and state constitutional rights;
2. The trial court erred by admitting hearsay;

3. The trial court erred by admitting testimony that bolstered witness credibility;
4. The prosecution improperly vouched for witness and called Mr. O'Bryant a liar;
5. The child hearsay statute is unconstitutional; and,
6. The cumulative errors warrant a new trial.

Id. The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions and sentences in *O'Bryant v. State*, unpub. dispo. No. F-2018-294 (Okl. Cr. August 29, 2019). *See State's Exhibit 2.*

After Petitioner's conviction was final, an investigation was conducted which revealed that Judge Henderson had a sexual relationship with two separate assistant district attorneys that appeared before him. Judge Henderson and Assistant District Attorney, K.C. each entered a Stipulation acknowledging that they engaged in a sexual relationship between the dates of April 2016 and August 2018. *See State's Exhibits 3 & 4.* However, they disagree whether the relationship was consensual or coerced. *Id.* These circumstances went undisclosed until March of 2021. *Id.* Judge Henderson asserts within his Stipulation that despite the sexual relationship he did not have an actual or subjective bias. *See State's Exhibit 3.*

Judge Henderson also had a sexual relationship with Assistant District Attorney C.T. *Fort v. State*, 2022 OK CR 12, ¶ 4, 516 P.3d 690. Henderson claimed the relationship was consensual. *Id.*, at fn. 2. C.T. asserted that she was the victim of coercion and sexual assault. *Id.* The relationship began in February of 2020 and continued until March of 2021. *See Exhibit 5, Affidavit for Search Warrant.*

There is no record of Judge Henderson having a sexual relationship with any other prosecutor in Oklahoma County. *Id.* Assistant District Attorneys, Ryan Stephenson and Kate Brandon, have executed Affidavits disavowing any improper relationship, bias, or appearance of impropriety. *See Exhibits 6 & 7, Affidavit.* The prosecutors at trial have affirmed under oath that: (1) they did not have a sexual, romantic, or any type of improper relationship with Judge Henderson; (2) they had a professional relationship with the Judge; (3) they did not witness Judge Henderson give any preference to either herself or any of her colleagues in the District Attorney's Office; (4) they did not perceive any appearance of impropriety in this case; (5) Judge Henderson appeared unbiased; (6) the Judge was fair and impartial to the criminal defendants who appeared in his courtroom; (7) Judge Henderson's rulings were based upon the law; and (8) they did not perceive any prejudice to the criminal defendants they prosecuted before Judge Henderson. *Id.*

On October 20, 2022, Petitioner, acting *pro se*, filed his Application for Post-Conviction Relief. He raised the following proposition of error:

1. Judge Henderson's failure to recuse himself from presiding over Petitioner's jury trial violated Petitioner's state and federal constitutional rights to a fair and impartial judge. Okl. Const. Art II §§ 7, 20, U.S. Const. Amend. 14.

Petitioner filed his Motion to Stay Post-Conviction Proceedings that same day.

MOTION FOR STAY

Pursuant to 22 O.S. § 1081 (OSCN 2022), Petitioner was required to present all documents and exhibits which supported his claim in or attached to his Application. The State had thirty (30) days to response to Petitioner's Application. 22 O.S. § 1083(A) (OSCN 2022). As the trial transcripts are not necessary to determine which Assistant District Attorney's prosecuted Petitioner at trial, the record is sufficient to determine Petitioner's claim. Since Petitioner has not shown cause to issue a stay, there is no valid reason for the Court to not determine Petitioner's Application. Therefore, Petitioner's Motion to Stay Post-Conviction Proceedings is denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

In his sole proposition of error, Petitioner claims that he was denied a fundamentally fair trial asserting that Judge Henderson's secret sexual relationship with the two female prosecutors causes doubts about his impartiality and fairness in this case. Reviewing the record, this Court's concludes that Petitioner has not met his burden of demonstrating that he was denied a fair and impartial tribunal. *Davis v. State*, 2005 OK CR 21, ¶ 18, 123 P.3d 243, 248.

Both the United States Constitution and the Oklahoma Constitution guarantee an accused a fair trial before a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 372. "There is a general presumption of impartiality on the part of judges as to matters before them." *Fields v. State*, 1996 OK CR 35, ¶ 64, 923 P.2d 624, 636; see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (presumption that judge serves with honesty and integrity). A defendant asserting that the trial judge was biased must overcome this presumption and "show the trial court harbored prejudice against him which materially affected his rights at trial and that he was prejudiced by the trial court's actions." *Welch*, 2000 OK CR 8, ¶ 37. Since bias can be difficult to prove, "[t]he 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.'" *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quotations and citation omitted). Under this test, a reviewing court asks "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the [judge's] interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Recently, the Court of Criminal Appeals addressed the potential for bias when a trial judge engages in sexual acts with the prosecuting attorney who tried the defendant's case. In *Fort v. State*, 2022 OK CR 12, ¶ 6, 516 P.3d 690, 693, prosecutor C.T. appeared for the State before Judge Henderson at a pretrial conference, a *Jackson v. Denno* hearing, the jury trial, and sentencing proceeding. Henderson and prosecutor C.T. were involved in a sexual relationship at that time. *Id.*,

at ¶ 4. Henderson claimed the relationship was consensual. *Id.*, at fn. 2. C.T. asserted that she was the victim of coercion and sexual assault. *Id.* Neither Henderson nor C.T. disclosed the sexual relationship to Fort or his attorneys before or during Fort's trial. *Id.*, at ¶ 6. After Fort was convicted the Court of Criminal Appeals remanded the matter for an evidentiary hearing. *Id.*, at ¶ 22. The District Court found that the facts of the case presented an unconstitutional potential for bias as admonished against in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009), and determined that a new trial was necessary to preserve the integrity and reputation of the State's criminal justice system. *Fort*, at ¶¶ 8-9. The Court of Criminal Appeals affirmed the District Court's decision finding that "the sexual relationship between the trial judge and the prosecuting attorney violated Fort's due process right to an impartial and disinterested tribunal." *Id.*, at ¶ 13.

Applying this precedent to the instant case results in the conclusion that Petitioner has not overcome the presumption that Judge Henderson was unbiased and impartial in his case. Petitioner has neither alleged nor shown than any of the assistant district attorneys who prosecuted his case were engaging in sex acts with Judge Henderson. The record clearly shows that Assistant District Attorneys, "C.T." and "K.C." did not appear at Petitioner's trial or any of the motion hearings. *See State's Exhibit 1.*

The present case is distinguishable from the Court of Criminal Appeals decision in *Fort*. The prosecutors that prosecuted the case on behalf of the State have disavowed any improper relationship, bias, or appearance of impropriety. *See Exhibits 6 & 7*. Assistant District Attorneys, Ryan Stephenson and Kate Brandon, have executed Affidavits disavowing any improper relationship, bias, or appearance of impropriety. *Id.* The prosecutors at Petitioner's trial have affirmed under oath as follows: (1) They did not have a sexual, romantic, or any type of improper relationship with Judge Henderson; (2) They had a professional relationship with the Judge; (3) They did not witness Judge Henderson give any preference to either herself or any of her colleagues in the District Attorney's Office; (4) They did not perceive any appearance of impropriety in this case; (5) Judge Henderson appeared unbiased; (6) the Judge was fair and impartial to the criminal defendants who appeared in his courtroom; (7) Judge Henderson's rulings were based upon the law; and (8) They did not perceive any prejudice to the criminal defendants they prosecuted before Judge Henderson. *Id.* Accordingly, Judge Henderson's impartiality may not be reasonably questioned in this matter.

Instead, it is clear that the average judge in Judge Henderson's position would likely be neutral. The records shows that there was not any appearance of impropriety in this case. The Judge did not have a questionable relationship with any of the parties or attorneys in the case. Petitioner was ably represented by well-respected defense counsel, David Smith. *See State's Exhibit 1*. Petitioner's conviction and sentence were affirmed on appeal. *See State's Exhibit 2*. Petitioner has not identified any ruling or decision which Judge Henderson rendered which exhibited actual or implied bias. Therefore, he has not demonstrated Judge Henderson was anything other than neutral and fair in his case.

Petitioner has not overcome the presumption of regularity and affirmatively established his allegation of error. *Russell v. Cherokee County Dist. Ct.*, 1968 OK CR 45, ¶ 5, 438 P.2d 293, 294. He has not presented any evidence to show that Judge Henderson had an improper relationship with the assistant district attorneys that prosecuted his case. *See Brown v. State*, 1997 OK CR 1, ¶