

ORIGINAL



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

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 11 2021

JOHN D. HADDEN
CLERK

ROBERT LEON HASHAGEN, III,)
)
 Appellant,)
)
 v.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2021-203

**ORDER REMANDING FOR EVIDENTIARY HEARING AND
HOLDING FURTHER BRIEFING IN ABEYANCE**

Appellant, Robert Leon Hashagen, III, was tried by jury and convicted of Murder in the First Degree, in violation of 21 O.S.Supp.2012, § 701.7(B), in the District Court of Oklahoma County, Case No. CF-2017-1448. The Honorable Timothy R. Henderson, District Judge, presided at trial and, in accordance with the jury's recommendation, sentenced Appellant to life imprisonment. Judge Henderson also ordered that Appellant receive credit for time served.

Appellant was charged by Information in this case on March 8, 2017. Appellant was bound over for trial at the conclusion of a preliminary hearing held on November 15, 2017. Appellant made

his first District Court appearance before Judge Henderson on January 17, 2018. Appellant's jury trial was held on January 25, 2021, through February 2, 2021. The State was represented at trial by prosecutors Jimmy Harmon, Lori McConnell and Kelly Collins. Appellant was represented at trial by attorneys Clayburn T. Curtis and Benjamin Munda. Formal sentencing was held on March 4, 2021.

On March 10, 2021, Appellant filed a timely Notice of Intent to Appeal and Designation of Record in the District Court. On April 14, 2021, Appellant perfected his appeal by filing a Petition in Error with this Court. The District Court clerk thereafter filed a Notice of Completion of Record on Appeal and the record for this case was transmitted to this Court. Appellant has requested two extensions of time in which to file his brief in chief with this Court. Appellant's brief in chief is currently due to be filed on or before October 12, 2021.

On September 10, 2021, Appellant through counsel filed with this Court a Motion For New Trial, Request For Evidentiary Hearing, and Motion To Hold Briefing In Abeyance. This motion was filed

pursuant to Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021) and 22 O.S.2011, §§ 952-953.

In the motion for new trial, Appellant alleges the existence of a previously undisclosed sexual relationship between Judge Henderson and prosecutor Kelly Collins. Appellant attaches several non-record exhibits detailing Judge Henderson's abrupt resignation from the bench effective April 5, 2021, amidst an ongoing criminal investigation into his alleged sexual contact with at least three female attorneys, one of whom was identified in an unsealed search warrant application as Collins. Based upon these exhibits, Appellant claims "that he can establish that within the last five years, including during at least part of the pendency of this case in the court below, the judge who presided over his trial engaged in a sexual relationship with at least one of the prosecutors in his case." Motion at 10.

Appellant states he was previously unaware of the sexual contact because it was undisclosed and thus he was unable to request recusal or otherwise present this claim during the proceedings before the trial court. Appellant requests that his case be remanded for an evidentiary hearing on grounds of newly

discovered evidence of judicial bias and that further briefing in this appeal be held in abeyance until the conclusion of the remanded proceedings.

Appellant's motion for new trial is in proper order and was timely filed with this Court. A defendant may file a motion for new trial when "new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial[.]" 22 O.S.2011, § 952(7). Because Appellant has perfected his appeal, the motion for new trial is properly filed with this Court. Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). Appellant's motion was properly filed within one year of the imposition of judgment and sentence in this case. 22 O.S.2011, § 953.

The allegations contained in the motion for new trial strike at the heart of an accused's constitutional due process right to a fair trial before a fair tribunal. "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." *Welch v. State*, 2000 OK CR 8, ¶ 37, 2 P.3d 356, 372 (quoting *Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157, 1163). See Okla. Const. art. 2, § 6.

The federal Due Process Clause too requires a “fair trial in a fair tribunal[.]” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (internal quotation omitted). See U.S. Const. amends. V, XIV. Such has been described as a “basic requirement of due process” by the Supreme Court. *In re Murchison*, 349 U.S. 133, 136 (1955).

Notably, a showing of actual subjective bias is not required to establish a due process violation. *Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899, 1905 (2016). The Supreme Court has held that “[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge has no actual bias.” *Rippo v. Baker*, __U.S.__, 137 S. Ct. 905, 907 (2017) (per curiam) (internal quotations omitted). The real question is “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*, 136 S. Ct. at 1905 (internal quotations omitted). Put somewhat differently: “[r]ecusal is required when, objectively speaking, ‘the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.’” *Rippo*, 137 S. Ct. at 907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Our Rules provide that we may dispose of a motion for new trial “on the pleadings and the accompanying affidavits of the respective parties, by separate order or in the opinion on the appeal, may direct a response, or may remand for an evidentiary hearing in the trial court[.]” Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021).

The allegations contained in Appellant’s motion for new trial require fact finding. The gravity of these allegations, and the fundamental nature of the right at stake, requires that the matter be addressed now. We therefore **REMAND** this case to the District Court of Oklahoma County for an evidentiary hearing addressing the claims contained in Appellant’s motion for new trial. We also **STAY** further briefing in this appeal pending the completion of the remanded proceedings.

The District Court may make any necessary orders concerning subpoenas, and for the exchange of witness and exhibit lists by the parties, prior to the scheduled hearing. The hearing shall be transcribed and the District Court shall admit at the hearing any relevant stipulations, testimony and other exhibits. The District Court thereafter shall make written findings of fact and conclusions

of law concerning the claims set forth in Appellant's motion for new trial. While the District Court's findings of fact and conclusions of law shall be given strong deference by this Court in deciding the claims raised by Appellant, this Court shall ultimately decide whether the motion for new trial is granted or denied.

The following deadlines for this hearing shall apply:

1. The District Court shall conduct the evidentiary hearing within forty-five (45) days of this order.
2. The court reporter shall file an original and two (2) certified copies of the transcript within twenty (20) days after the hearing is completed.
3. The District Court shall make written findings of fact and conclusions of law to be submitted to this Court within twenty (20) days of the filing of the transcripts.
4. Within five (5) days of the filing of the District Court's findings, the District Court clerk shall transmit the findings, record and transcripts of the remanded proceedings to the Clerk of this Court;
5. Within thirty (30) days of the filing with this Court of the findings, the record and the transcripts of the remanded proceedings, Appellant shall file his brief in chief on appeal setting forth his assignments of error. Appellant's brief in chief shall also include any supplemental

argument and authority offered in support of the motion for new trial in light of the expanded record. The regular page limits for briefs set forth in Rule 3.5(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021) shall apply.

6. Within sixty (60) days of the filing of Appellant's brief in chief on appeal, the State's response brief shall be filed with this Court addressing Appellant's assignments of error and his motion for new trial.

IT IS FURTHER ORDERED that the Clerk of this Court is directed to transmit a copy of this order to the Court Clerk of Oklahoma County; the District Court of Oklahoma County, the Honorable Ray C. Elliott, Presiding Judge; counsel of record; the Oklahoma Attorney General; and Oklahoma County District Attorney David Prater.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit a copy of the following, with this Order, to the District Court of Oklahoma County: Appellant's Motion For New Trial, Request For Evidentiary Hearing, and Motion To Hold Briefing In Abeyance, filed with this Court on September 10, 2021.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

11th day of October, 2021.

Scott Rowland - Recused

SCOTT ROWLAND, Presiding Judge

Robert L. Hudson

ROBERT L. HUDSON, Vice Presiding Judge

Gary L. Lumpkin

GARY L. LUMPKIN, Judge

David B. Lewis

DAVID B. LEWIS, Judge

*- Specially
Concurring
Writing
Attached*

ATTEST:

John D. Hadden
Clerk

LUMPKIN, JUDGE: CONCUR IN RESULTS

I agree this matter requires fact finding and must be remanded to the District Court. In addition, I believe any fact finding and conclusions of law should include a determination of whether any of the allegations, if found to be true, had any effect on the trial of the case in this matter. This court is not vested with judicial office disciplinary power and must always look to the fairness of the trial in each particular case. Therefore, the findings should include an evaluation of the fairness of the trial and what, if any, impact the allegations that may be proven true had on that trial.

LEWIS, JUDGE, SPECIALLY CONCURRING:

I concur in remanding this case for an evidentiary hearing on Appellant's motion for new trial based on newly discovered evidence of an undisclosed relationship between a prosecutor and the trial judge. By consenting to entry of the order remanding for evidentiary hearing, I do not express or imply any view on the separate question of whether any Judge of the District Court is qualified to preside over the remanded proceedings in this case. Any challenge to the impartiality or qualification of a particular judge or judges to preside over the proceedings on remand should be presented in accordance with Rule 15, *Rules for District Courts*, 12 O.S.Supp.2020, Ch. 2, App.