NO. COA11-169
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Nash County
No. 07 CRS 054953, 8026

RODNEY ANTOINE ALSTON

Appeal by defendant from judgment entered 28 January 2010 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Oliver G. Wheeler IV, for the State.

Mercedes O. Chut, for Defendant-Appellant.

ERVIN, Judge.

Defendant Rodney Antoine Alston appeals from a judgment sentencing him to 238 to 295 months imprisonment based upon his convictions for second degree murder and possession of a firearm by a felon. On appeal, Defendant contends that the trial judge erred by failing to disqualify himself from any participation in this case. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to

relief from the trial court's judgment on the basis of the claim he has asserted before this Court.

I. Factual Background

On 22 July 2007, a warrant for arrest charging Defendant with first degree murder and possession of a firearm by a felon was issued. On 8 October 2007, the Nash County grand jury returned a bill of indictment charging Defendant with murder.[1] On 28 January 2010, Defendant entered pleas of guilty to second degree murder and possession of a firearm by a felon subject to an agreement that "all remaining charges will be dismissed," that the "cases will be consolidated for sentencing," and that Defendant "will receive a sentence of not less [than 238] months nor more than [295] months."

At the beginning of Defendant's plea hearing, the trial court had Defendant placed under oath and stated that:

> Alright, Mr. Alston, the first thing that I want to tell you is this: The victim in the matter[,] although I did know him personally, I am a very good friend of his mother. She worked for me when I practiced law many years ago, and have maintained that association over the years. I want you to be appri[s]ed of that fact. Now, I give you an option at this point. If you want me to take the plea in your case, I will, but I

[1] Although other portions of the record suggest that the Nash County grand jury returned a bill of indictment charging Defendant with possession of a firearm by a felon as well, no such indictment appears in the record on appeal.

> will not do so without having fully advised you of that fact.

After Defendant indicated that he wanted the trial court to conduct the proceedings that would be necessitated by the entry of his guilty plea, the trial court told Defendant to "[b]e sure you talk to [your trial counsel] about it first, just don't give me an answer." At that point, Defendant's trial counsel informed the trial court that, "before [Defendant] was sworn[,] I did explain that to" Defendant and, "[b]ased on our conversation[,] he wants to go ahead with the plea today." Defendant responded affirmatively to the trial court's questions concerning whether "that is what you want to do" and whether Defendant "waive[ed] any conflict or potential conflict" and "wish[ed the trial court] to take this plea after being fully advised of [the trial court's] prior knowledge of this victim's mother and association with her." At the conclusion of this discussion, Defendant signed a written statement to the effect that he had been "advised of a potential conflict of the court's knowledge of [the] victim's family and agrees to waive any conflict or defect with the court's acceptance of the plea."

After addressing the conflict issue, the trial court conducted the required plea colloquy with Defendant, listened to a statement from the prosecutor intended to satisfy the factual

basis requirement enunciated in N.C. Gen. Stat. § 15A-1022(c) in which the prosecutor indicated that the killing of the victim occurred at a gang-related party, and heard a statement addressing sentencing-related issues from Defendant's trial counsel. At that point, the victim's mother told the trial court that:

> This is very difficult for me, but I have to do it, because my son - there are no winners in this case regardless [of] how much time [Defendant] receives. His mother has lost and I have already lost my son. My son didn't want to go to this party, because of his friend he did. My sadness comes from it that he was shot for trying to help someone else. I will not see him graduate from college. I will not see him get married or I will not have any grandchildren by him. I will [not] feel his arms around me anymore. I will not see his face smile anymore. [Defendant], I don't hate you. I forgive you. I hope that you can find some kind of peace in what you have done. I hope that the gangs in Rocky Mount will realize shooting and killing each other is not the answer to survival. It's not the answer to life. It has to come to a stop. A gun does not make a man, [Defendant]. It doesn't. I hope that you learn from this and I want you to know that my prayers go with you and your family.

After the victim's mother finished her statement, Defendant made a statement in allocution in which, despite taking "full responsibility for what [he had] done" and noting that his brother "got killed in the same situation," he claimed that,

"[a]s far as me just pulling out a gun for no reason, it wasn't like that." In response, the trial court stated, in part, that:

> And I know that I am boring you and I apologize, I do apologize, but I feel compelled to say this to you. It tells me a lot about what type of man you are, by what you're doing right now. Because if you were concerned about what I'm saying you would be paying attention to me. But you're looking around as if I am talking to the dang old wall over there. So whatever you tell me about how good you are you just satisfied in my mind exactly what you are. Because you don't have the common decency and courtesy to look me in the eye when I am talking to you [whether] you agree with me or disagree with me. That is the mark of a man. Now, while you're gone I hope you do grow up. See what I mean. Son[,] you have got a lot of living to do. You have got a long way to go. And you have got a very short time to get there. I think you['re] take-taking nothing from this. All this rigmarole about what you found out, how you miss everybody, and all that kind of stuff. You haven't learned anything.
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> [DEF.]: How can you say that?
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> THE COURT: I am saying that because that is the impression that you give me right or wrong. Yes, sir. That is the impression that you give me. And it's up to you, your mother, your sister, your brother, all of us, [the victim's mother,] everybody in here wish[es] the best for you. But nobody can make you do what you're supposed to do. Put this aside for a moment, put it aside. The question now is going to be what type of person/man you're going to be from this day forward. Realizing that you cannot undo the past, you have got to accept it and live with that certainly. But tomorrow is

> the future, and what do you do tomorrow with your life. What type of man and individual you become the day after today and days after that and months and years after that? What you do in terms of being a productive member of society, a good [and] decent person. Those are the things that I am talking about, but I apologize. I didn't mean to bore you. Let me as they say, I digress. Let me get to the point.

Following the making of these comments, the trial court found that Defendant had ten prior record points and should be sentenced as a Level IV offender. Based upon these determinations, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a minimum term of 238 months and a maximum term of 295 months imprisonment. On 12 August 2010, this Court allowed Defendant's request for *certiorari* review of the trial court's judgment.

II. Legal Analysis

On appeal, Defendant contends that the trial court erred by accepting Defendant's guilty plea and entering judgment against him on bias-related grounds. Although Defendant acknowledges that the trial court disclosed his relationship with the victim's mother and obtained Defendant's consent to the trial court's participation in the proceedings necessitated by his plea, Defendant contends that "the [r]ecord does not show that [the trial court] acknowledged or evaluated his own *potential*

for bias" and argues that the trial court "departed from [Canon] [3.D of the Code of Judicial Conduct] when he conducted an examination of [Defendant] about waiving the conflict ***in his presence***" and failed to obtain "a written waiver of conflict of interest" from all parties. Although we agree that Defendant had a constitutional right to have his case heard by an unbiased trial judge, ***Withrow v. Larkin***, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975) (stating that having one's case decided by a "biased decisionmaker [is] constitutionally unacceptable" and that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"), we do not believe that Defendant has established the existence of the sort of bias or prejudice necessary to support an award of relief from the trial court's judgment.

As Defendant candidly concedes, he never moved that the trial court be disqualified from participating in the proceedings necessitated by his decision to enter a negotiated plea. For that reason, neither N.C. Gen. Stat. § 15A-1223(b) nor Canon 3.C of the Code of Judicial Conduct,[2] both of which are

[2] N.C. Gen. Stat. § 15A-1223 and Canon 3 of the Code of Judicial Conduct "control the disqualification of a judge

implicated by the filing of a disqualification motion, have any application in the present case. *In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456, *disc. review denied*, 361 N.C. 428, 648 S.E.2d 506 (2007). For the same reason, the decisions requiring a trial court confronted with a disqualification motion to refer the motion to another judge under certain circumstances, *North Carolina Nat'l Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 380 (1976); *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 784 (1978), have no relevance to the proper decision of this case either. Instead, the validity of Defendant's argument must be evaluated pursuant to N.C. Gen. Stat. § 15A-1223(a), which provides that "[a] judge on his own motion may disqualify himself from presiding over a criminal trial or other criminal proceeding," and Canon 3.D of the Code of Judicial Conduct, which provides, in pertinent part, that "[n]othing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative."

A trial judge should recuse himself or herself in the absence of a disqualification motion when the defendant shows "'objectively that grounds . . . exist . . . consist[ing] of

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presiding over a criminal trial." *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996).

substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.'" *State v. McRae*, 163 N.C. App. 359, 365, 594 S.E.2d 71, 76 (quoting *Scott*, 343 N.C. at 325, 471 S.E.2d at 612), *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004). Nothing in the record tends to show that the trial court was so biased or prejudiced against Defendant as a result of his prior relationship with the victim's mother that he committed an error of law by failing to disqualify himself from further participation in Defendant's case on his own motion. Instead, the record clearly reflects that the trial court disclosed the existence of his relationship with the victim's mother in open court and obtained Defendant's verbal and written consent to his participation before taking Defendant's plea and entering judgment. The fact that the trial court disclosed the existence of his prior relationship with the victim's mother and indicated that he would not "take the plea" unless Defendant affirmatively wished that he do so indicates that the trial court had, in fact, considered his own ability to fairly and impartially decide the issues that would inevitably come before him in light of Defendant's decision to enter a negotiated plea and concluded that he would be able to do so. Although Defendant points to the trial court's comments in the aftermath

of Defendant's statement in allocution as evidence of bias or partiality, those comments appear to have stemmed from Defendant's conduct in the courtroom and do not show any sort of personal bias or prejudice against Defendant. As a result, Defendant has not shown sufficient bias or prejudice to establish that the trial court should have recused himself from further participation in Defendant's case on his own motion.

We do not find Defendant's arguments in reliance on the specific requirements of Canon 3 of the Code of Judicial Conduct convincing either. In spite of Defendant's contrary suggestion, we know of no requirement that a trial court make findings or develop some sort of "a record" "concerning his own *potential* for bias." In addition, the trial court was clearly advised by Defendant's trial counsel that Defendant and his trial counsel had, in fact, consulted privately about the extent, if any, to which Defendant wished to proceed in light of the trial court's relationship with the victim's mother. Finally, although the prosecutor did not sign the written waiver that appears in the record, we are unable to see why that fact should lead us to grant relief from the trial court's judgment to Defendant, particularly given that the State heard the trial court's description of his prior relationship with the victim's mother and made no objection to the trial court's continued

participation in this proceeding after receiving that information. As a result, we do not believe that Defendant is entitled to relief based on the trial court's alleged non-compliance with various provisions of Canon 3 of the Code of Judicial Conduct.

The situation before us in this case is one in which the trial court fully disclosed his potential conflict of interest, Defendant affirmatively expressed a desire to proceed with full knowledge of the relationship between the trial court and the victim's mother, and the trial court imposed the exact sentence specified in Defendant's plea agreement. In the course of Defendant's sentencing hearing, the victim's mother expressed forgiveness for Defendant rather than calling for additional punishment over and above that to which Defendant had already agreed. The trial court's comments at the sentencing hearing appear to have been motivated by Defendant's conduct and demeanor instead of from any sort of disqualifying bias or prejudice. As a result, Defendant has not shown that the trial court erred by failing to disqualify himself from participating in the proceedings resulting from the entry of Defendant's negotiated plea.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by not disqualifying himself from further participation in Defendant's case on his own motion. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).