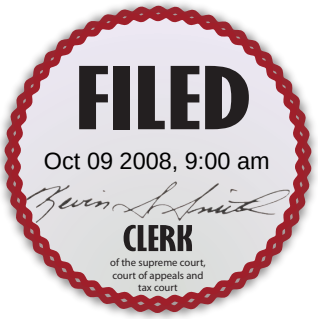

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IN THE
COURT OF APPEALS OF INDIANA

SEAN MORSE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0807-CR-635
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0806-FD-156928

October 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In this appeal, Sean Morse challenges an order revoking his status as released on his own recognizance and reinstating his bond. We dismiss.

Issues

Morse raises two issues, which we restate below:

I. Whether the State submitted sufficient evidence to meet the statutory requirements for revocation; and

II. Whether the presiding judge erred in not recusing herself from the case.

Facts and Procedural History

On June 27, 2008, in Marion County, Morse was charged with intimidation as a class D felony. That same day, Judge Lisa Borges issued a warrant for Morse's arrest and set bond at $100,000. The judge based her order on an affidavit for probable cause, which included the following allegations:

> ON 06/11/08 DEPUTY D. WOODS … AND LT. PAYNE … WERE NOTIFIED AT APPROXIMATELY 1130 HOURS THAT JUDGE [CYNTHIA AYERS] HAD RECEIVED A COPY OF A DISCIPLINARY COMPLAINT FILED AGAINST COMMISSIONERS GOODEN AND LYNCH. JUDGE AYERS RECEIVED A COPY OF THIS THROUGH THE MAIL BY [MORSE]. IN THIS LETTER [MORSE] IS VERY VERBAL ABOUT HOW IF HE DOES NOT GET WHAT HE WANTS HE IS WILLING TO DIE AND KILL FOR WHAT HE BELIEVES.
>
> ON JUNE 23, 2008, I, DETECTIVE PHILIP BEAVER, WAS ASSIGNED TO INVESTIGATE THIS INCIDENT, BECAUSE A CHILD CUSTODY HEARING WAS SET FOR JUNE 30, 2008. THE JUDGE AND COURT STAFF WERE CONCERNED FOR THEIR SAFETY BECAUSE THERE WERE THREATS TO KILL PEOPLE IF JUDGE AYERS DID NOT MAKE THE RULING THAT [MORSE] WANTED.
>
> I OBTAINED A COPY OF THE LETTER THAT WAS SENT TO JUDGE AYERS, AND OBTAINED THE ORIGINAL AND PLACED IT IN THE

PROPERTY ROOM. I SUBMITTED A REQUEST TO THE CRIME LAB REQUESTING THAT THEY CHECK THE ORIGINAL FOR FINGERPRINTS BELONGING TO [MORSE].

THE ENVELOPE ADDRESSED TO JUDGE AYERS CONTAINED A COVER LETTER FROM [MORSE] ASKING HER TO READ THE ATTACHED 22 PAGE LETTER HE SENT TO THE QUALIFICATIONS COMMISSION COMPLAINING ABOUT THE DECISION OF MASTER COMMISSIONER ALICIA GOODEN AND JUDGE SHERYL LYNCH. THESE DECISIONS RELATED TO CHILD CUSTODY HEARINGS WITH [MORSE] AND MEMORY FUQUA RELATING TO THEIR DAUGHTER SHANIA. ON PAGE 13 OF THE LETTER HE STATES "I hadn't forgotten about the Master Commissioner. I wanted her dead just as much as Memory and I was contemplating how I might be able to make that dream a reality. It felt as if they were conspiring against me." ON PAGE 14 HE RELATED A DAYDREAM HE HAD IN COURT ON MAY 31, 2006 RELATING TO JUDGE SHERYL LYNCH AFTER SHE TOLD HIM SHE HAD HEARD ABOUT HIM. HE RELATES THAT "It was a good daydream. In it, I grabbed a fistful of Sheryl's long black hair and separated her head from the rest of her body with one clean swipe of a very sharp blade."

WHEN [MORSE] SENT THE LETTER ON JUNE 6, 2008, THERE WAS A FINAL CUSTODY HEARING SET FOR JUNE 11, 2008 IN JUDGE AYERS' COURT. HE REFERS TO A MOTION FOR CONTEMPT HE FILED AGAINST STEPHEN FUQUA, AND THE COPY HE SENT TO MR. FUQUA'S ATTORNEY VANESSA LOPEZ. HE STATES THAT MS. LOPEZ FILED A RESPONSE STATING THE LETTER SHE RECEIVED WAS THREATENING.

ON PAGE 22 IN THE FINAL PARAGRAPH, [MORSE] STATES THAT "When June 11 gets here, if I don't get Shania, if I walk into that courtroom and find out that I have a warrant because Lopez is trying to say that she felt threatened, I assure you that she will have more than enough reason to feel that way after I'm done. When I show up for court, I'm coming prepared to die and kill if I have to for Shania." AND THAT "If I do have to snap like a twig and have the coroner[']s office working around the clock, I'm going to blame it on post traumatic stress disorder."

I WAS CONTACTED BY CRIME LAB TECHNICIAN RACHEL DONALDSON, WHO STATED THAT SHE FOUND A FINGERPRINT OF [MORSE] ON THE COVER LETTER ADDRESSED TO JUDGE AYERS, THE FIRST PAGE THAT SHE CHECKED.

App. at 10-11.

On July 1, 2008, Master Commissioner Curtis J. Foulks presided over an initial hearing in Morse's case. The entire transcript from the initial hearing consists of the following:

> THE COURT: Sean Morse?
> THE DEFENDANT: Yes, your Honor.
> THE COURT: This is a probable cause warrant out of Court 15. The charge is Intimidation. It's a D felony. The maximum penalty is three years in jail and $10,000 in fines. Do you understand your initial hearing rights?
> THE DEFENDANT: Yes, sir.
> THE COURT: Do you have an attorney?
> THE DEFENDANT: No, I don't have.
> THE COURT: The Public Defender will represent you. Next Monday, 8:30 a.m., you must report to Court 15. You'll be released up to that.
> THE DEFENDANT: Thank you.

Tr. at 5. The Justice Information System ("Justis") entry memorializing the events of July 1, 2008, includes the following notations:

> INITIAL HEARING MINUTES 07/01/08
> Def. in person
> Probable cause found for arrest of Def.
> Deft. advised pursuant to I.C. 35-33-7-5 and 6, advised of charges Filed, provided with copy of charges requested on all felonies. Deft. also advised of Jury Trial rights and time limitations pursuant to C.R. 22. Preliminary plea of Not Guilty entered.
> BOND REVIEW
> Court ORDERS Defendant released ON OWN RECOGNIZANCE
> Def. requests P.D.; indig. hrg.
> Def. indig., P.D. appointed
> *FILE NOT AVAIL*.

App. at 5 (emphasis added).

On July 2, 2008, the State filed a verified emergency motion to revoke Morse's status as released on his own recognizance and to reinstate bond. *Id*. at 18-20. Also on that day,

Judge Borges held a brief hearing on the matter during which she expressed her surprise that Morse had been released, and she indicated that she would like to speak with Master Commissioner Foulks to "find out what, if anything, was presented to him." Tr. at 15. Defense counsel objected to the State's motion and argued that Judge Borges should recuse herself from the case because the alleged victim was another Marion County judge. Though voicing her belief that she might recuse at some point, Judge Borges noted the "exigency of the circumstances" and the "danger to the community that's alleged" as reasons in favor of granting the motion. *Id*. at 14-16.

On July 3, 2008, Commissioner Israel Cruz presided over a short follow-up hearing at which he informed Morse: "Violation of conditions of release. Judge Borges set your bond at $100,000. That's her way of telling me do not release him. You'll be in court July 7th, 9:00 a.m." *Id*. at 17, 7, 8. Indeed, an order revoking Morse's status as released on his own recognizance and setting his bond at $100,000 was signed by Judge Borges and dated July 2, 2008. App. at 21 (the "July 2 Order").

On July 7, 2008, Morse filed a request for bail adjustment and a motion for change of judge and appointment of special judge. On July 22, 2008, Morse filed a supplemental motion for change of judge and appointment of special judge. In addition, Morse filed a notice of appeal of the July 2 Order and requested expedited treatment. Upon completion of the transcript, an expedited appeal proceeded.

Discussion and Decision

I. Sufficiency

Morse contends that the court erred in revoking his release on his own recognizance because the State "submitted no evidence and met none of the statutory requirements for bail revocation." Appellant's Br. at 3. Morse claims that on the day after his release the State "filed a motion to revoke his bond[.]" *Id.* At the outset, we clarify that the State's emergency motion was not a motion to revoke bond but a motion to "Revoke [Morse's] Status as Released on His Own Recognizance and [to] *Reinstate* Bond." App. at 18-20 (emphasis added). That is, the State's motion was, in effect, a request to alter bail – specifically to increase it from released on recognizance to the setting of a $100,000 bond.[1] In granting the motion, Judge Borges' July 2, 2008 order did just that. *Id.* at 21 (ordering Morse's "status as released on his own recognizance revoked and his bond be set in the amount of: $100,000."). With that clarification, we consider Morse's assertion that the State presented no evidence in support of its motion, instead relying on a call from Judge Ayers to the prosecutor during which she shared her concern for her safety and that of others.

Alteration of bail is governed by Indiana Code Section 35-33-8-5, which provides:

> (a) *Upon a showing of good cause, the state* or the defendant *may be granted an alteration* or revocation *of bail* by application to the court before which the proceeding is pending. In reviewing a motion for alteration or revocation of bail, *credible hearsay evidence is admissible to establish good cause*.
>
> (b) *When the state presents additional*:
>
> (1) evidence relevant to a high risk of nonappearance, based on the factors set forth in section 4(b) of this chapter; or
>
> (2) *clear and convincing evidence*:
>
> (A) of the factors described in Ind. Code 33-14-10-6(1)(A) and IC 33-14-10-6(1)(B)[2]; or

[1] We cannot help but wonder if the immediate filing of a motion to reconsider the release may have quickly disposed of this case.

[2] Indiana Code Section 35-40-6-6 provides that if:

(B) *that the defendant otherwise poses a risk to the physical safety of another person or the community*;

the court may increase bail.

(c) When the defendant presents additional evidence of substantial mitigating factors, based on the factors set forth in section 4(b) of this chapter, which reasonably suggests that the defendant recognizes the court's authority to bring him to trial, the court may reduce bail. …

(Emphases added).

Applied here, the State had to show good cause to have Morse's bail altered, and credible hearsay evidence was admissible. To increase bail, the State had to present either "additional evidence" that Morse was at high risk of not appearing or "additional clear and convincing evidence" that Morse otherwise posed a risk to the physical safety of another person or the community. Neither in the State's July 2, 2008 motion nor at the hearing thereon before Judge Borges did the State argue, let alone submit evidence (hearsay or otherwise), that Morse was at high risk of not appearing. Thus, we focus on whether the State submitted additional clear and convincing evidence that Morse "otherwise posed a risk to the physical safety of another person or the community."

In its motion to revoke Morse's release on his own recognizance and reinstate $100,000 bond, the deputy prosecutor for the State alleged that (1) while the court's file shows that the State requested a no contact order, no such order had been placed, (2)

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(1) a victim submits to the prosecuting attorney an affidavit asserting:

(A) that an act or threat of physical violence or intimidation has been made against the victim or the immediate family of the victim; and

(B) that the act or threat described in clause (A) has been made by the defendant or at the direction of the defendant; and

(2) the prosecuting attorney has reason to believe the allegations in the affidavit are true and warrant the filing of a motion for bond revocation;

the prosecuting attorney shall file a motion under IC 35-33-8-5 requesting the court to

according to the Justis entry, Master Commissioner Foulks did not have Morse's file when he released Morse, and (3) on July 2, 2008, the deputy prosecuting attorney received a telephone call from Judge Ayers expressing her concern for the safety of the judicial officers involved in Morse's custody dispute. App. at 19.

In examining whether a defendant poses a risk to physical safety, a *request* for a no-contact order that has not been placed is of limited probative value. As for the Justis notation, "FILE NOT AVAIL," this may[3] mean that Master Commissioner Foulks had no facts from the case when he released Morse. That is, it may offer a possible explanation for why Morse was released despite the serious allegations. However, the notation itself is not evidence, hearsay or otherwise, that Morse posed a risk to the physical safety of another person or to the community.

We now turn to Judge Ayers' phone call. According to the deputy prosecutor, on July 2, 2008, Judge Ayers called him and "expressed concern as to her safety and the safety of Master Commissioner Gooden and Judge Lynch." App. at 19. Although the substance of the call was hearsay, it was admissible under Indiana Code Section 35-33-8-5(a). Clearly, the phone call is evidence that Judge Ayers believed Morse posed a risk to the physical safety of another person, specifically Judge Ayers, Master Commissioner Gooden, and Judge Lynch. Whether it constitutes "*additional clear and convincing* evidence" that Morse "otherwise posed a risk to the physical safety of another person or the community," thus supporting an

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revoke the defendant's bond or order for personal recognizance.

[3] There is some insinuation that even if Master Commissioner Foulks had no official file on the matter, he may have had access to some other information regarding the case. Tr. at 15; Reply Br. at 4 n.2.

increase in bail pursuant to Indiana Code Section 35-33-8-5(b)(2)(B), is another question. If Master Commissioner Foulks had no information about the case when he made his decision to release Morse, and if thereafter he had been the judge to determine whether to grant or deny the State's motion to revoke release, then Judge Ayers' phone call might have been "additional" clear and convincing evidence to Master Commissioner Foulks. However, Judge Borges, who was well aware of the safety concerns, was the judge who issued the written order granting the State's motion to revoke release and set bond. Moreover, in relaying Judge Borges' ruling to Morse, Commissioner Cruz noted, "violation of conditions of release," which would imply that new allegations against Morse had justified the increase, i.e. the setting of bond at $100,000. However, it is unclear from the prosecutor's representation of Judge Ayers' phone call if new safety concerns arose or whether her concerns were ongoing.

Fortunately, Morse's recent decision to plead guilty makes it unnecessary for us to attempt to untangle the above events to determine whether the court was within its discretion in altering Morse's bail by revoking his release and increasing his bond back to $100,000. As per an August 25, 2008 plea agreement, Morse is now serving a 180-day executed sentence, with fifty-five days of good time credit. Not surprisingly, the State has since filed a verified motion for involuntary dismissal of this appeal on mootness grounds. Morse argues against involuntary dismissal yet acknowledges his case no longer requires expedited treatment.

A case is moot when no effective relief can be rendered to the parties before the court. *See Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006). "While generally, we dismiss cases that are deemed to be moot, a moot case may be decided on its merits when it involves questions of great public interest that are likely to recur." *Golub v. Giles*, 814 N.E.2d 1034, 1036 n.1 (Ind. Ct. App. 2004), *trans. denied*; *Moore v. State*, 882 N.E.2d 788, 797 (Ind. Ct. App. 2008) (noting that issues were moot, yet addressing merits as a way to provide direction to trial courts in future cases); *Cent. Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 726 (Ind. 2008) (addressing moot case that was "of public interest and capable of repetition").

Morse's case is moot. That said, his case does offer an opportunity to emphasize that, when alteration of bail is at issue, strict adherence to the requirements of Indiana Code Section 35-33-8-5 should be the norm. As for the State's argument that the "real issue" is whether Master Commissioner Foulks had the legal authority to release Morse, we disagree. The State did not object to Master Commissioner Foulks' authority until now, thus arguably waiving the issue for appeal. *See Floyd v. State*, 650 N.E.2d 28, 32 (Ind. 1994). Moreover, master commissioners generally have the same powers as magistrates, who are statutorily authorized to set bail. *See* Ind. Code § 33-33-49-16(e); Ind. Code § 33-23-5-5(8).

II. Recusal

Morse challenges Judge Borges' decision not to recuse herself from his case. Citing Canon 3(C)(1) of the Indiana Code of Judicial Conduct, Morse argues that there was a reasonable basis for questioning Judge Borges' impartiality regarding the bail revocation. Specifically, Morse claims that because Judge Borges and Judge Ayers, the alleged victim,

are "colleagues" on the "same court," Judge Borges' objectivity might be brought into doubt. Appellant's Br. at 6, 7.

"A judge ... shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ind. Judicial Conduct Canon 2(A). Pursuant to Judicial Conduct Canon 3(E)(1), "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality *might* reasonably be questioned[.]" (Emphasis added). In determining the disqualification question, the test is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality rather than whether the judge's impartiality is impaired in fact. *See Tyson v. State*, 622 N.E.2d 457, 459 (Ind. 1993) (discussing Canon 3(C)(1), now Canon 3(E)(1)). The Commentary to Canon 3(E) provides:

> Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared.
>
> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.
>
> *By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge* might be required to participate in judicial review of a judicial salary statute, or *might be the only judge available in a matter requiring immediate judicial action*, such as a hearing on probable cause or a temporary restraining order. *In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.*

(Emphases added).

On July 2, 2008, Judge Borges heard Morse's recusal argument, admitted that she could envision recusing herself at some point, but felt it necessary to rule on the motion to revoke Morse's release because of the real potential of imminent harm. This appears to be an example of the rule of necessity temporarily overriding a possible[4] disqualification. While this should not be a common occurrence, there are times when a recusal issue must be placed on hold for a short time. Indeed, a change-of-judge motion was granted in Morse's case a few weeks later, and a special judge from another county was appointed not long thereafter. More importantly, we reiterate that Morse has since entered a plea agreement to serve a 180-day executed sentence, thus disposing of the case. Accordingly, the recusal issue is moot.

Dismissed.

KIRSCH, J., and VAIDIK, J., concur.

[4] We use the term "possible" so as not to imply that disqualification/recusal was automatically required here merely because Judge Borges serves on the same thirty-five-person bench as Judge Ayers. (Indeed, if membership on the same court were all that was necessary to require recusal, we question how an appeal involving a judge on the Court of Appeals could ever be resolved.) Rather we are simply setting out the events as they transpired here.