

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RONALD ESPIE,

Defendant-Appellant.

UNPUBLISHED

December 21, 2021

No. 355920

Shiawassee Circuit Court

LC No. 99-002999-FC

Before: STEPHENS, P.J., and BORRELLO and O’BRIEN, JJ.

PER CURIAM.

Defendant appeals as on leave granted¹ the order of the Chief Judge of the Shiawassee Circuit Court denying his motion to disqualify his sentencing judge from resentencing him under MCL 769.25a for a murder defendant committed when he was 16 years old. We affirm.

I. BACKGROUND

In 1998, defendant killed 71-year-old Nathan Nover, a civilian transportation officer who was driving defendant from a juvenile detention facility to a psychological evaluation. At the time of the murder, defendant was 16 years old. Defendant was tried as an adult for first-degree premeditated murder and first-degree felony murder, and after his jury-trial convictions, his sentence of life in prison without the possibility of parole was mandatory.

After Nover’s death, the Family Division of the Shiawassee Circuit Court created a Nathan Nover Memorial Scholarship Fund. A second, separate scholarship fund was created by contributions from family and colleagues. At the time of defendant’s motion to disqualify his

¹ This Court initially denied defendant’s application for leave to appeal, see *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920), but our Supreme Court subsequently remanded “for consideration as on leave granted,” *People v Espie*, ___ Mich ___; 954 NW2d 518, 518 (2021).

sentencing judge, these scholarships were administered by the Shiawassee Community Foundation, of which the sentencing judge was a board member.

After defendant was sentenced, the United States Supreme Court in *Miller v Alabama*, 567 US 460, 477-478; 132 S Ct 2455; 183 L Ed 2d 407 (2012), held that it was cruel and unusual punishment to automatically sentence juveniles to mandatory life in prison without the possibility of parole. In response, our Legislature passed MCL 769.25a, which, in the event that *Miller* was ever ruled to be retroactive, established procedures for resentencing juveniles sentenced to mandatory life in prison without the possibility of parole before *Miller* was decided. Thereafter, in *Montgomery v Louisiana*, 577 US 190, 206; 136 S Ct 718; 193 L Ed 2d 599 (2016), the United States Supreme Court ruled that *Miller* applied retroactively. As a result, defendant was eligible for resentencing under MCL 769.25a. Defendant was appointed counsel to represent him in the ensuing proceedings.

Before defendant's resentencing, his counsel learned that the sentencing judge oversaw the scholarships given in Nover's name through the judge's work on the board of the Shiawassee Community Foundation. Upon learning this information, defendant, through his counsel, moved to disqualify the sentencing judge. Both the sentencing judge and the Chief Judge denied defendant's motion to disqualify, determining that the sentencing judge's connection to Nover was too attenuated to support disqualification.

After filing his initial application for leave to appeal, defendant moved to expand his application for leave to address issues related to events that occurred at subsequent hearings. This Court allowed defendant to expand his application but denied leave to appeal. *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920). The Michigan Supreme Court then remanded for this Court to consider the application as on leave granted. *People v Espie*, ___ Mich ___; 954 NW2d 518, 518 (2021).

II. MOTION FOR DISQUALIFICATION

On appeal, defendant reasserts the arguments that he made before the sentencing judge and Chief Judge—that his right to due process will be violated if the sentencing judge is allowed to preside over his resentencing hearing because the judge's doing so would create an appearance of impropriety. We disagree.

A. STANDARD OF REVIEW & ISSUE PRESERVATION

To preserve an issue of judicial bias, a party must raise the claim before the trial court within 14 days of discovering the grounds for disqualification. See *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011); MCR 2.003(D)(1)(a). Defense counsel learned of the scholarship funds on August 28, 2020, learned of the sentencing judge's membership on the board of the Shiawassee Community Foundation administering the scholarships on September 1, 2020, and filed defendant's motion for disqualification within 14 days of discovering the connection between the judge and the scholarships. While the prosecution is correct that, more than 14 days before filing his motion, defendant knew both that Nover was a court employee and that there were scholarships given in Nover's name, defendant learned of his sentencing judge's connection to Nover and the scholarships (i.e., the judge's position as a member of the board overseeing the

Nover scholarships) less than 14 days before he filed his motion. We therefore conclude that the issue was timely raised and is properly preserved.

For preserved issues concerning judicial disqualification, this Court reviews for an abuse of discretion the factual findings made by a chief judge, but reviews de novo the application of those facts to the law. *Cain v Dep't of Corrections*, 451 Mich 470, 503, 503 n 38; 548 NW2d 210 (1996). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

B. ANALYSIS

“A criminal defendant is entitled to a neutral and detached magistrate.” *Jackson*, 292 Mich App at 598 (quotation marks and citation omitted). While there is a heavy presumption in favor of judicial impartiality, *id.*, a judge must be disqualified if the defendant can establish that the judge cannot hear a case impartially, see *Cain*, 451 Mich at 494-495. To do this, a defendant need not establish that the judge is actually partial; a judge may be disqualified based upon the mere appearance of impropriety. Under MCR 2.003(C)(1)(b)(ii), disqualification is warranted if a judge “has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” This Canon provides in pertinent parts that “[a] judge must avoid all impropriety and appearance of impropriety,” that “[a] judge should not allow family, social, or other relationships to influence judicial conduct or judgment,” and that “[a] judge should not allow activity as a member of an organization to cast doubt on the judge’s ability to perform the function of the office” Code of Judicial Conduct, Canon 2(A), (C), and (D). To assess the appearance of impropriety, courts consider whether a reasonable person informed of all the facts and circumstances would perceive the judge’s ability to be impartial to be impaired. *Kern v Kern-Koskela*, 320 Mich App 212, 232; 905 NW2d 453 (2017), citing *People v Aceval*, 486 Mich 887, 889; 781 NW2d 779 (2010) (statement by HATHAWAY, J.)

Nover was employed by the Shiawassee County Probate Court (not the circuit court) until 1998 when he was killed. The sentencing judge did not become a judge of the circuit court until 20 years after Nover’s death, in 2018. Nothing in the record suggests that the sentencing judge had either a personal or professional relationship with Nover, and the Chief Judge did not abuse his discretion by finding that the sentencing judge had never employed Nover.² A reasonable person would not believe that the sentencing judge’s ability to be impartial would be impaired by Nover’s employment with the court more than 20 years before the judge was even part of the court.

Further, we agree with the Chief Judge that the sentencing judge’s connection with Nover through the scholarships was ancillary. In arguing that the sentencing judge’s actions and

² Defendant’s assertion that Nover was an employee of the trial court is not supported by the ethics opinion that he has provided on appeal. The opinion addresses an inquiry from a probate judge considering whether to employ a court lawyer to represent indigent parties, and states that “the county treats the chief judge of the probate court as the employer of all persons working for the court.” Ethics Op JI-050 p 1 (1992). The Ethics Opinion does not stand for the proposition that all court workers are necessarily employees of all judges in the court as a matter of law.

connections created an appearance of impropriety, defendant pointed not to only the judge's position as a member of the board that oversaw the scholarships given in Nover's name, but also to the fact that the sentencing judge was a keynote speaker at an event attended by recipients of scholarships from the Shiawassee Community Foundation. The Chief Judge's finding that the sentencing judge had only an ancillary connection to Nover and the scholarships did not fall outside the range of reasonable and principled outcomes. Accordingly, defendant cannot overcome the presumption of impartiality because the connection between the sentencing judge and the case at hand was too tenuous. Accord *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 600; 640 NW2d 321 (2001).

III. RULINGS AFTER APPEAL WAS FILED

Defendant also argues that the sentencing judge's statements at hearings following defendant's motion for disqualification demonstrated actual bias or the appearance of impropriety sufficient to warrant disqualifying the judge. We disagree.

A. STANDARD OF REVIEW & ISSUE PRESERVATION

Defendant did not raise this issue in the trial court, so it is unpreserved. See *Jackson*, 292 Mich App at 597. However, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). The facts underlying defendant's argument are largely uncontested, and at issue on appeal is solely whether those facts warrant judicial disqualification. Moreover, this Court granted defendant's motion to expand his application for leave to appeal to include this issue, *People v Espie*, unpublished order of the Court of Appeals, entered February 16, 2021 (Docket No. 355920), and the arguments made on appeal relate to events that took place during or after the trial court denied defendant's motion to disqualify. Under these circumstances, we choose to exercise our discretion and treat the issue as preserved.

Whether the facts underlying defendant's motion warrant disqualification is a question of law reviewed de novo. *Cain*, 451 Mich at 503 n 38.

B. ANALYSIS

In addition to the appearance of impropriety discussed in Section II.B., disqualification is warranted when "[t]he judge is biased or prejudiced against a party or attorney." MCR 2.003(C)(1)(a). To establish judicial bias, a party must demonstrate that the judge is unable to make fair rulings, or has a hostility or deep-seated antagonism toward the party. *Jackson*, 292 Mich App at 598; *Cain*, 451 Mich at 495 n 29.

1. RESIGNATION FROM BOARD

After the trial court denied defendant's motion for disqualification, which was based in part on the sentencing judge's position on the board of the Shiawassee Community Foundation, the sentencing judge disclosed to the parties that he had received an email concerning one of the

Nover scholarships, and “[r]ather than abstaining or requesting to be isolated from discussion of the scholarship, [he] resigned [his] position on the board.” Defendant argues that this decision “implies actual bias because, in the process of acknowledging a potential conflict, [the sentencing judge] ignored the guidance of the Canons [of the Michigan Code of Judicial Conduct] and court rules which prefer disqualification.”

First, we note that defendant does not cite any authority in support of his assertion that “the Canons and court rules . . . prefer disqualification.” Both merely set out the circumstances in which disqualification is necessary. This in no way means that they “prefer disqualification.”

Second, defendant appears to be simply rehashing his argument that the sentencing judge’s position on the board created an appearance of impropriety. He argues, in effect, that he was correct that the sentencing judge’s position on the board created an appearance of impropriety, and that is why the sentencing judge resigned. However, for the reasons previously explained, the sentencing judge’s position on the board did not create an appearance of impropriety, and the judge’s decision to resign from the board is of no consequence.

Third, the sentencing judge acknowledged alternatives that would have allowed him to stay on the board and be uninvolved with the Nover scholarships—such as abstaining from voting on the issue concerning the Nover scholarship and asking to be isolated from discussion related to the Nover scholarships—but chose instead to resign. We fail to see how the judge’s choice to resign demonstrates actual bias any more than any of the alternatives would.

Finally, defendant appears to assert that the sentencing judge’s decision to resign from the board rather than recuse himself from this case demonstrates actual bias because recusal only requires filing a form, and hundreds of judges recuse from cases every year. We fail to see how either fact—that recusal is a simple process or that numerous judges use this process—in any way demonstrates that a judge’s decision to not recuse him or herself from a given case is evidence of actual bias. Regardless, it is certainly not evidence of actual bias in this case. Accordingly, defendant’s argument that the sentencing judge demonstrated actual bias by resigning from the Shiawassee Community Foundation is without merit.

2. USE OF LOADED TERMS

Next, defendant argues that the sentencing judge used loaded terms when ruling that defendant should have raised the issue of judicial bias earlier. As relevant to this argument, the sentencing judge ruled that, although it was possible that defendant’s current counsel did not discover the ground for disqualification until August 2020, “[defendant] knew, and the Court declines to let him restart the clock by concealing this information from his attorney only to deploy it for tactical advantage.” Defendant takes issue with the sentencing judge’s assertion that defendant was “concealing this information” and using “it for tactical advantage,” but judicial rulings almost never constitute a valid basis for a finding of bias, even if the judge’s language was critical of a defendant. *Jackson*, 292 Mich App at 598. A judge’s ruling is only grounds for disqualification if the ruling displays “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.* The sentencing judge’s ruling here did not display a deep-seated favoritism or antagonism towards defendant that would make fair judgment impossible. We therefore conclude that the ruling pointed out by defendant does not require disqualification.

3. MOTION TO ADJOURN AND COVID PROTOCOLS

Defendant lastly argues that the sentencing judge's decision to grant a joint request for adjournment because the victims' families had not been contacted, the judge's later decision to deny a second request for adjournment, and the judge's decision to allow Nover's family to attend defendant's resentencing allegedly in violation of the Covid-19 safety protocols in place at the time, when taken together, "imply actual bias in their imbalance, and that violates due process."

With respect to defendant's argument that the sentencing judge demonstrated bias by granting the parties' joint motion for adjournment, we find the argument meritless. In its order, the court stated that it was granting the motion to adjourn "because the parties agree that the pre-sentence investigation report (PSIR) is incomplete[.]" While the sentencing judge stated at the hearing on the motion that the failure to contact Nover's family for the PSIR carried "great weight" with him, those oral statements did not display deep-seated bias in favor of Nover's family or against defendant. Moreover, defendant requested the adjournment, and we fail to see how the sentencing judge agreeing with defendant that adjournment was appropriate demonstrates that the sentencing judge was biased against defendant.

Turning to defendant's argument that the sentencing judge's decision to deny his later request for an adjournment demonstrated actual bias or created the appearance of impropriety, we find this issue to be meritless as well. In support of this argument, defendant simply rehashes his motion for adjournment, apparently arguing that the sentencing judge's decision to deny his motion in light of these arguments demonstrates that the sentencing judge was actually biased. As previously explained, however, a judge's ruling is not a ground for alleging bias unless the ruling displayed a deep-seated favoritism or antagonism against a party such that the exercise of fair judgment is impossible, *Jackson*, 292 Mich App at 598, and simply ruling against a party does not meet this high bar. Moreover, the sentencing judge gave a detailed opinion spanning six pages of transcript in which the judge carefully explained why he was denying defendant's motion. Defendant fails to grapple with the judge's ruling on appeal, and instead merely asserts that the sentencing judge must have been actually biased because he ruled against defendant. There is no legal basis for granting defendant the relief he requests on the basis of such an argument.

Finally, with respect to defendant's argument that the sentencing judge demonstrated bias by allowing Nover's family to attend the resentencing hearing in supposed contravention of COVID-19 safety protocols, we find that this issue, too, is completely meritless. Defendant testified that he believed it was "vitally important" for Nover's family to be able to attend the hearing in person. In light of this testimony, it is disingenuous for defendant to now argue that the sentencing judge's decision to allow Nover's family at the resentencing demonstrated bias against defendant or the appearance of impropriety.

Accordingly, we disagree with defendant that any of these decisions by his sentencing judge support disqualification.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Stephen L. Borrello

/s/ Colleen A. O'Brien