Court of Appeals, State of Michigan

ORDER

People of MI v Kwame Kilpatrick

Docket No. 285794

LC No. 08-111273-AS

Kirsten Frank Kelly
Presiding Judge

Kurtis T. Wilder

Christopher M. Murray
Judges

On June 6, 2008, this Court held in abeyance the People's application for leave to appeal and directed defendants to file answers to the prosecution's application within ten days. The Court now removes the application from abeyance, and further orders that the application for leave to appeal is DENIED.

In the application for leave to appeal, the People seek to recuse, and therefore preclude, all judges of the 36th District Court bench from conducting the preliminary exam in this case. Importantly, the People's application does *not* seek the recusal of only one particular assigned judge. See MCR 2.003(B). Historically, the Michigan Supreme Court has recognized that every judge is granted a strong presumption "of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would seek to impeach the presumption [of impartiality] so amply justified through the years." *Mahlen Land Corp v Kurtz*, 355 Mich 340, 350-351; 94 NW2d 888 (1959). See also, *Aetna Life Ins Co v Lavoie,* 475 US 813, 820; 106 S Ct 1580; 89 LEd2d 823 (1986) (where the United States Supreme Court also noted this presumption, and recognized that a judge "is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."). The People acknowledge this longstanding principle of law, and concede in their application that there is no judge of the 36th District Court that has an *actual* bias mandating recusal under MCR 2.003(B). Rather, the People seek recusal of the entire 36th District Court, asserting as the basis for recusal of the entire bench that such action would purportedly allow this case to avoid "even the possibility of public concern over the impartiality of the forum," citing *Wayne Co Board of Comm'rs v Wayne Circuit Judges*, 403 Mich 860 (1978) and *Special Wayne Prosecutor v Recorder's Court Judges*, 409 Mich 1119 (1980).

As we noted more than 20 years ago, however, neither *Wayne Co Board of Comm'rs v Wayne Circuit Judges* nor *Special Wayne Prosecutor v Recorder's Court Judges* provide any analysis of the facts or articulation of the factors relied upon by the Michigan Supreme Court when it concluded that recusal of the entire bench in those particular cases was warranted. *In re Hirsch*, 116 Mich App 233, 242; 323 NW2d 349 (1982). As such, these cases are neither binding precedent nor persuasive authority as applied in the instant case. *In re Hirsch, supra*; *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001). In addition, because the appearance of impropriety language derives from federal statutes which, under federal law, "afford more protection to parties than does the constitution," the situations under Michigan law where the "appearance of impropriety" standard could even arguably apply require a showing "so strong as to arise to the level of a due process violation." *Cain v Dep't of Corrections*, 451 Mich 470, 512 n 48; 548 NW2d 210 (1996). The People do not assert a due process violation in this case.

We conclude, therefore, that MCR 2.003(B) and not the appearance of impropriety standard applies to the requested recusal in this case because "where there are specific court rules...that pertain to a subject, such as judicial disqualification," the specific court rule is to be applied and not "[t]he more general "appearance of impropriety" standard." *In re Haley,* 476 Mich 180, 194; 720 NW2d 246 (2006). See, also, *Adair v Dep't of Education,* 474 Mich 1027, 1038 n12; 709 NW2d 567 (2006), noting that "[u]nlike the disqualification rules of some states, there is no "appearance of impropriety" language contained in MCR2.003(B), doubtless because its drafters were concerned about such language vitiating the specific provisions set forth in the rule."

Applying MCR 2.003(B)(1)-(6) and relevant case law to the particulars asserted by the People, disqualification of the 36th District Court bench is not required. First, the fact that Judge Carter or other judges of the 36th District Court bench may be called as witnesses during the preliminary examination does not require recusal, as MCR 2.003(B)(6) requires the recusal of a judge only when "the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person...is to the judge's knowledge likely to be a material witness in the proceeding." None of the judges who are proposed to be witnesses fall within this rule. Additionally, that the judges of the 36th District Court may have relationships with witnesses beyond those proscribed in the court rule does not warrant recusal, in absence of a showing of bias (and none is alleged), because the role of the judge in a preliminary exam is not to gauge guilt or innocence, and generally does not require making credibility determinations. *People v Doss*, 406 Mich 90, 103; 276 NW2d 9 (1979) (when evidence at the exam conflicts, judge need not decide credibility, as defendant should be bound over for circuit court jury to resolve conflicts in evidence); *People v Greenberg*, 176 Mich App 296, 307; 439 NW2d 336 (1989) ("If [witnesses] testimony was subject to attack as unworthy of belief, that is a question for the jury at trial and does not undermine a decision to bind over."). We have also previously held that recusal of a particular judge or the entire bench is not warranted where the assigned jurist would have to make credibility determinations concerning a judicial colleague's immediate family member, *People v Prast*, 114 Mich App 469, 481; 319 NW2d 627 (1982), while other courts have held that recusal is not warranted when a judicial colleague is a witness. See, *Mungin v State*, 932 So 2d 986, 994 (Fla, 2006) ("there is no specific requirement that a trial judge recuse himself or herself simply because a fellow judge in the circuit is to serve as a witness."), and *Meyer v Foti*, 720 F Supp 1234, 1238 n5 (ED La, 1989).

The notion that courts, as a whole, must recuse themselves when a party – such as a member of Congress - has a voice in the court's budget, has likewise been rejected as unsound even under an appearance of impropriety standard, *US v Poludniak*, 657 F2d 948, 954 (CA 8, 1981), and the People's assertion that defendant Kilpatrick's involvement in the budget process for the court requires recusal of the entire bench fails under the law. Additionally, that defendant Kilpatrick, as a political figure, has professional or social interactions with the members of the 36th District Court bench is only the natural result of our elective process for judges, see *Republican Party of Minnesota v White,* 536 US 765, 788-792; 122 S Ct 2528; 153 L Ed2d 694 (2005) (O'Connor, J., concurring). We also note that none of the alleged political considerations argued by the People as support for the recusal request pertain to defendant Beatty, and that the People's concerns expressed specifically about Judges Giles, Carter, Bryant-Weekes, Bright and Miller are not relevant to a consideration of removing the entire bench, but instead would pertain to an evaluation as to whether it was appropriate for those individual judges to be recused.

Finally, the apparently unwritten practice of the 36th District Court to recuse the entire bench under certain circumstances is simply not enforceable as applied in this case. This "practice" is not embodied in a local court rule or formal written policy approved by the State Court Administrator, and it was not part of an order in this case. See *People v Davie,* 225 Mich App 592, 600; 571 NW2d 229 (1997). Thus, we are left to apply the court rule and cases that are applicable to the particular allegations made by the People.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 02 2008

Date

Sandra Schultz Mengel

Chief Clerk