

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF DEARBORN,

Plaintiff-Appellant,

UNPUBLISHED
November 14, 2013

v

GLEN NAVOY,

Defendant-Appellee.

No. 311069
Wayne Circuit Court
LC No. 12-002189-AR

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

The People of the city of Dearborn appeal by leave granted¹ the order entered by the circuit court affirming the disqualification of Judge Mark W. Somers in defendant's case involving the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.* We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was arrested in the city of Dearborn, after which he was charged with the misdemeanor offense of possession of marijuana in violation of Dearborn City Code § 14-158. Before trial, defendant filed a motion to disqualify district court Judge Somers from presiding over his case, pursuant to MCR 2.003(C)(1). Defendant intended to rely on the MMMA in his defense, and claimed that Judge Somers should be disqualified because his participation in defendant's case would present a serious risk of bias impacting defendant's due process rights. Furthermore, defendant asserted that Judge Somers failed to adhere to the appearance of impropriety standards of Canon 2 of the Michigan Code of Judicial Conduct. The prosecution opposed this motion, asserting that defendant did not present sufficient evidence to overcome the strong presumption of impartiality and to prove actual bias on the part of Judge Somers. After both sides presented oral arguments at the hearing on this motion, Judge Somers denied defendant's motion for disqualification.

¹ *City of Dearborn v Navoy*, unpublished order of the Court of Appeals, entered March 20, 2013 (Docket No. 311069).

Defendant sought de novo review of this motion by district court Chief Judge Richard Wygonik. At the hearing, defense counsel asserted that, at the outset, defendant would have to overcome Judge Somers' references to marijuana as, "devil's weed, satan's surge and satan's weed," and his repeated lectures to defendants before his court on their connection to drug cartels and the deaths of people in Mexico. Defense counsel then argued that defendant would also have to overcome Judge Somers' decision in *People v Robert Michael Brandon*,² where he declared the MMMA unconstitutional in its entirety. Lastly, defense counsel asserted that defendant would have to overcome Judge Somers' comments about the *Brandon* decision in an interview on television, where he talked about the MMMA, and how he thought it was an unfavorable and problematic law. Defendant argued that, in viewing all of this conduct collectively, it creates the appearance of bias and causes serious doubt regarding Judge Somers' ability to conduct an impartial trial in a case involving the MMMA. Judge Wygonik agreed with defendant's assertions and granted the motion to disqualify Judge Somers.

The prosecution then appealed Judge Wygonik's order granting disqualification to the circuit court. The circuit court affirmed and remanded the matter to the district court for trial.

II. SUFFICIENCY OF FINDINGS AND CONCLUSIONS

The prosecution first contends that Judge Wygonik's ruling lacks any specific findings of fact or applications of law sufficient to overcome the presumption of judicial impartiality and to meet the grounds for disqualification under MCR 2.003(C). We disagree.

"When this Court reviews a decision on a motion to disqualify a judge, the trial court's findings of fact are reviewed for an abuse of discretion, while the application of the facts to the relevant law is reviewed de novo." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Here, the prosecution does not argue that Judge Wygonik abused his discretion in making his findings and conclusions, but rather, the prosecution's main contention is that Judge Wygonik's ruling lacks any specific findings of fact or applications of law. A party may not rely on this Court to make his arguments for him. *Rorke v Savoy Energy, LP*, 260 Mich App 251, 260; 677 NW2d 45 (2003). Therefore, this Court will not address whether Judge Wygonik abused his discretion in making his findings of fact, and it will only address whether the findings and conclusions given by Judge Wygonik were sufficient in granting the motion for disqualification.

"Although it is always preferable for the purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions, the court is not required to do so by court rule." *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). According to MCR 2.517(A)(4), "findings and conclusions of law are unnecessary in

² *People v Robert Michael Brandon*, unpublished opinion of the 19th District Court, issued March 7, 2011 (Docket Nos. 10C0214 and 10C0215).

decisions on motions unless findings are required by a particular rule.” In the instant case, MCR 2.003 governs the disqualification of judges, and absent from the language in the court rule is any requirement that the trial court state its findings of fact and conclusions of law when deciding whether to grant or deny a motion for disqualification. Therefore, the prosecution’s argument that Judge Wygonik’s cursory ruling is deficient should fail because Judge Wygonik was not required to make any specific findings of fact or conclusions of law pursuant to MCR 2.517(A)(4) and MCR 2.003.

In any event, even if the trial court were required to make findings of fact and conclusions of law regarding defendant’s motion to disqualify, Judge Wygonik did, in fact, do so. At the hearing on this motion, Judge Wygonik ruled:

I think your briefs and arguments have pretty much have [sic] said enough for me to make a decision to grant Defendant’s motion under MCR 2.003 based upon the briefs and the arguments and therefore, Defendant should present an order accordingly.

Therefore, Judge Wygonik presumably accepted the facts and law set forth in defendant’s brief and oral argument. Furthermore, Judge Wygonik made various comments throughout the motion hearing, in which he expressed his concern with the fact that, in *Brandon*, Judge Somers declared the MMMA unconstitutional, in its entirety. He opined that Judge Somers’ view on the MMMA would effectively deprive defendant of the defense he intended on presenting at trial. Therefore, Judge Wygonik made sufficient findings of fact and conclusions of law in holding that Judge Somers be disqualified from presiding over defendant’s possession of marijuana case involving the MMMA.

III. GROUNDS FOR DISQUALIFICATION

The prosecution next contends that Judge Wygonik erred in granting defendant’s motion to disqualify Judge Somers from presiding over defendant’s possession of marijuana case involving the MMMA, MCL 333.26421 *et seq.*, pursuant to MCR 2.003(C)(1)(b)(i) and (ii). We disagree.

Any party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Wells*, 238 Mich App at 391. Defendant challenged Judge Somers under MCR 2.003(C)(1), which governs the grounds for disqualification of judges, and provides, in pertinent part:

(1) Disqualification of a judge is warranted for reasons that include, *but are not limited to* the following:

* * *

(b) The judge, based on objective and reasonable perceptions, has either (i) a *serious risk of actual bias impacting the due process rights* of a party as enunciated in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. —, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), or (ii) has *failed to adhere to the appearance of*

impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [Emphases added.]

The prosecution first contends that there was not a serious risk of actual bias impacting defendant's due process rights as enunciated in *Caperton*. The United States Supreme Court, in *Caperton*, asked whether, "under a realistic appraisal of psychological tendencies and human weakness, the interest [of the judge] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 US at 883-884 (internal citations omitted). This Court has held, "[d]ue process principles requires disqualification, absent a showing of actual bias or prejudice, in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009) (internal quotation marks omitted). Disqualification pursuant to the Due Process Clause is only required "in the most extreme cases." *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996).

In the instant case, defendant intended on asserting the MMMA as a defense to his possession of marijuana charge. In support of his motion to disqualify, defendant asserted that Judge Somers' decision in *Brandon* created a serious risk of actual bias impacting defendant's due process rights. A criminal defendant has a right to present a defense under our state and federal constitutions. US Const, Ams VI, XIV; Const 1963, art 1, § § 13, 17, 20; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). A defendant's right to present a defense is a fundamental element of due process. *Id.* Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness, which requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. *Id.*

In *Brandon*, the defendant sought dismissal of all charges pursuant to the MMMA, MCL 333.26421 *et seq.* *Brandon*, unpub op at 1. Specifically, the defendant asserted the affirmative defense provided under Section 8 of MCL 333.26421. *Id.* Instead of addressing whether the defendant fell within the purview of the affirmative defense section of the MMMA, Judge Somers held that "the MMMA is rendered unconstitutional and void in its entirety by operation of the Supremacy Clause of the United States Constitution." *Id.* at 4. Judge Somers then denied the defendant's motion to dismiss brought pursuant to Section 8 of MCL 333.26421. *Id.* at 8.

In the present case, upon de novo review of defendant's motion to disqualify, Judge Wygonik expressed his concern with Judge Somers' decision in *Brandon*, and the impact it would have on defendant's opportunity to present a meaningful defense under the MMMA. Judge Wygonik stated:

Wait a second. If the defense is that he had a medical marijuana card – assuming it's applicable in this case, I don't know (sic). Assuming that it's applicable in the case and a judge says that the medical marijuana law doesn't exist in the State of Michigan as far as I'm concerned which means there's no such thing as a medical marijuana card. You can't have that defense.

* * *

Well, if [Judge Somers] held that the Medical Marijuana Act is unconstitutional, how can he then turn and say okay, I'm going to allow defendant to present a defense that's contained within the Medical Marijuana Act?

* * *

I mean I may have a different opinion about the interpretation of a particular section but to say that the whole thing is null and void. I mean that's not an interpretation. That is a pronouncement of death. I mean it's a – I mean you're not even into interpretation. It's like this law is – I don't recognize this law. I mean how could – I mean if a judge says, I don't recognize this law. Then how can you pursue a case under that law?

As shown above, Judge Wygonik's concerns surrounded the issue of how defendant will present a meaningful defense before a judge who has already declared the law, under which his defense rests, unconstitutional.

It seems apparent to this Court that Judge Somers' previous decision to declare the MMMA unconstitutional in its entirety, without any appellate courts agreeing or so holding, creates a serious risk of actual bias impacting defendant's due process right to present a complete defense under a valid state law. This is evidenced by the fact that the defendant in *Brandon* was denied this same opportunity, which was only less than a year before the current defendant first came before Judge Somers. *Brandon*, unpub op at 1, 8. Furthermore, Judge Somers stated on the record at the original hearing on this motion that he believes federal preemption still applies to the MMMA. Although Judge Somers may still allow defendant to present evidence in support of his defense under the MMMA, this predisposed belief regarding the unconstitutionality of this law creates a serious risk that actual bias exists, and will, in effect, hamper defendant's due process rights. Thus, it appears that Judge Somers prejudged defendant's intended defense under the MMMA, and the probability of actual bias on the part of Judge Somers is too high to be constitutionally tolerable.

Next, the prosecution asserts that Judge Somers did not fail to adhere to the appearance of impropriety standards set forth in Canon 2 of the Michigan Code of Judicial Conduct. The "test for determining whether there is an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *People v Aceval*, 486 Mich 887, 889; 781 NW2d 779 (2010) (internal quotation marks omitted). Canon 2 of the Michigan Code of Judicial Conduct provides, in relevant part:

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and

impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

In the instant case, Judge Wygonik made his decision to disqualify Judge Somers based upon defendant's brief in support of his motion and oral arguments. Judge Somers allegedly referred to marijuana as, "devil's weed" and "satan's surge," as evidenced in *Pucci v Nineteenth Dist Court*, where both the United States District Court for the Eastern District of Michigan³ and the United States Court of Appeals for the Sixth Circuit⁴ cited these statements in a wrongful termination suit against Judge Somers. Judge Somers also allegedly lectured the defendants who appeared before him in marijuana cases, stating that they have contributed to drug cartels and homicides in Mexico and other related areas. Lastly, Judge Somers took part in an interview and publicly expressed his personal feelings on the MMMA after ruling that this law was unconstitutional in its entirety. When viewing all of this conduct collectively, Judge Somers did not avoid the "appearance of impropriety" in regard to cases involving marijuana and the MMMA. Reasonable minds could perceive that Judge Somers' ability to carry out judicial responsibilities with impartiality in this area is impaired. Therefore, Judge Wygonik did not err in granting defendant's motion to disqualify Judge Somers from presiding over defendant's possession of marijuana case involving the MMMA.

This Court notes that, even if the grounds for disqualification do not fall under MCR 2.003(C)(1)(b)(i) or (ii), the language in MCR 2.003(C)(1) expressly states that, "the Disqualification of a judge is warranted for reasons that include, *but are not limited to* the following. . . ." This language indicates that the grounds for disqualification listed under MCR 2.003(C)(1) are nonexhaustive. Therefore, the grounds for disqualification did not need to specifically fall under any of the grounds listed in MCR 2.003(C)(1), and given the circumstances in this case, Judge Somers should have been disqualified.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro

³ *Pucci v Nineteenth Dist Court*, 565 F Supp 2d 792, 797 (E D Mich, 2008).

⁴ *Pucci v Nineteenth Dist Court*, 628 F3d 752, 757 (CA 6, 2010).