IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID C. SCHUBERT,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND CAROLYN ELLSWORTH, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 60596

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioner David Schubert's motion to disqualify the sentencing judge based on actual bias. Schubert pleaded guilty to unlawful possession of a controlled substance not for the purpose of sale. The sentencing judge imposed a suspended sentence of 16 to 40 months in prison and placed Schubert on probation for 3 years, along with various monetary assessments. As a special condition of his probation, the sentencing judge imposed a 9-month jail term. Subsequently, Schubert filed a motion to disqualify the sentencing judge based on actual and implied bias claiming that the sentencing judge prematurely adjudicated him without providing counsel an opportunity to address the court concerning deferred adjudication and the marshal placed him in handcuffs before pronouncement of the sentence. In accordance with statutory procedure for judicial disqualification, see NRS 1.235, the sentencing judge submitted a detailed affidavit denying the

allegations of actual and implied bias. And after reviewing the record, the chief judge of the district court denied the motion in a thorough order, meticulously detailing her findings and conclusion that Schubert failed to demonstrate actual or implied bias. Subsequently, Schubert filed this original petition for a writ of mandamus or prohibition challenging the chief judge's order. Although Schubert challenged the sentencing judge's actions as evidence of actual or implied bias below, his original writ petition focuses exclusively on his claim of actual bias.[1]

We have observed that "a petition for a writ of mandamus is the appropriate vehicle to seek disqualification of a judge." Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 254-55, 112 P.3d 1063, 1066 (2005); City of Sparks v. District Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station. NRS 34.160. In the context of mandamus, we consider whether the chief judge's ruling was a manifest abuse or arbitrary or capricious exercise of her discretion. Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); see also State v. Dist. Ct. (Armstrong), 127 Nev. ___, ___, 267 P.3d 777, 780 (2011) (explaining that "[a]n arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of law" and that

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[1]Schubert filed his petition in the alternative, seeking relief in mandamus or prohibition. Because prohibition is focused on arresting the proceedings or a district court that is acting in excess of its jurisdiction, NRS 34.320, and the chief judge clearly had jurisdiction over the motion to disqualify the sentencing judge, we conclude that prohibition is not the appropriate remedy in this matter.

"[a] manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule" (internal quotations, brackets, and citations omitted)).

Having abandoned his claim of implied bias, the sole issue before us is whether the chief judge manifestly abused her discretion or exercised her discretion in an arbitrary or capricious manner by denying Schubert's motion to disqualify the sentencing judge based on actual bias.[2] Schubert's actual bias claim is based on three things—(1) the sentencing judge's purported premature adjudication of his guilt, (2) the marshal's handcuffing of him before pronouncement of sentence, and (3) the imposition of a 9-month term of confinement as a condition of his probation. For the following reasons, we conclude that Schubert has failed to demonstrate that the chief judge manifestly abused her discretion or exercised her discretion in an arbitrary or capricious manner by denying his motion to disqualify the sentencing judge.

Schubert contends that the sentencing judge displayed actual bias by adjudicating him guilty before providing the parties and the Department of Parole and Probation (P&P) an opportunity to speak to deferred adjudication. The sentencing judge's actions, he argues, showed

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[2]Although Schubert raised a claim of implied bias below, he has not done so in his writ petition and therefore has abandoned any claim of implied bias. Consequently, implied bias is not at issue before this court. Rather, the sole issue before us is whether the chief judge manifestly abused her discretion or acted arbitrarily or capriciously in denying Schubert's motion to disqualify the sentencing judge based on actual bias. See generally Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (observing that arguments not presented in district court in first instance need not be considered on appeal), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

that she had closed her mind to deferred adjudication pursuant to NRS 453.3363, and, in fact, eliminated the possibility of imposing it. We see the record differently. In Cameron v. State, we considered a claim that comments by a sentencing judge reflected a personal interest in the outcome of case and therefore indicated improper judicial bias. 114 Nev. 1281, 1282, 968 P.2d 1169, 1170 (1998). In resolving that issue, we observed that "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." Id. at 1283, 968 P.2d at 1171. Considering Cameron's directive and the record, we reject Schubert's arguments on three grounds.

First, the record simply does not support a claim of actual bias. At the beginning of the sentencing hearing, the sentencing judge inquired whether there was any reason why sentencing should not proceed, and, hearing no objection, she adjudged Schubert guilty. She invited the State (represented by the Attorney General's Office) to speak, recognizing that the State did not oppose "a stayed adjudication and probation pursuant to 453.3363." Thereafter, Schubert made a statement of apology to the court for his actions. Following that statement, counsel expressed concern that the sentencing judge had adjudicated Schubert guilty before allowing counsel to speak, to which the judge responded that she would "defer that until I hear your [argument]." After listening to counsel's arguments, the sentencing judge again adjudicated Schubert guilty and imposed sentence.

Nothing in the sentencing judge's comments remotely suggests that she had closed her mind to deferred adjudication in this case. In fact,

they show quite the opposite. Although the sentencing judge adjudicated Schubert guilty at the beginning of the sentencing hearing, she clearly afforded the parties the opportunity to address deferring the judgment of conviction and was aware of P&P's sentencing recommendation in favor of deferred adjudication. She specifically stated that she would defer finding Schubert guilty until after counsel's argument. And the sentencing judge detailed her reasons for sentencing Schubert as she did based on the circumstances of the crime and his character—matters germane to sentencing. Additionally, in her affidavit in response to the motion to disqualify, the sentencing judge denied having any bias or prejudice against Schubert and averred that she had made no final sentencing decision before hearing from Schubert and counsel at the hearing. The sentencing judge's actions, coupled with her affidavit, show a measured sentencing decision, not actual bias.

Second, the chief judge's order meticulously explaining the grounds for denying Schubert's motion persuades us to conclude that he failed to show actual bias. The chief judge explained that the sentencing judge's procedure reflected "the custom and practice of criminal judges in the Eight Judicial District for the vast majority of cases." The chief judge further explained that the sentencing judge's remarks at the beginning of the hearing were indicative of "routine habit and practice," not bias or an intimation that the sentencing judge had a closed mind to the presentation of evidence. In support of her conclusion, the chief judge pointed out that the sentencing judge invited the State to comment to ensure she had a correct understanding of the agreement and responded to counsel's concern regarding premature adjudication by affirming that she would defer adjudication until after counsel's argument. Based on those

observations, the chief judge reasoned that the challenged comments by the sentencing judge did not evince bias. We agree. The chief judge's findings are based on procedures followed in the Eighth Judicial District, with which the chief judge is eminently familiar. The record, by which we are bound, overwhelmingly shows a consistent application of the Eighth Judicial District sentencing procedures.

Third, Schubert's argument that the sentencing judge's initial adjudication of guilt eliminated the possibility of deferred adjudication has no basis in law. In cases where the defendant pleads guilty to enumerated drug related offenses and has not previously been convicted of certain offenses, NRS 453.3363(1) permits "the court, without entering a judgment of conviction," to "suspend further proceedings and place the person on probation" upon certain terms and conditions. Even accepting Schubert's argument, no judgment of conviction had been entered at that point and therefore deferred adjudication under the statute was not barred at that point in the proceedings. Accordingly, Schubert's actual bias claim fails on this ground as well.

Considering the record before us, we conclude that Schubert has not satisfied Cameron by showing that the sentencing judge's comments or actions proved that she had "closed . . . her mind to the presentation of all the evidence," 114 Nev. at 1283, 968 P.2d at 1171, and therefore he cannot demonstrate that the chief judge manifestly abused her discretion or exercised her discretion in an arbitrary or capricious manner.

Schubert next argues that the sentencing judge displayed actual bias by allowing him to be handcuffed before she pronounced sentence, which according to him, showed that the sentencing judge

orchestrated the event with the marshal and had predetermined his sentence. Again, we must disagree for three reasons.

First, a plain reading of the record dispels any claim of actual bias. As the sentencing judge was relating the terms of Schubert's probation, counsel interrupted and asked that the marshal remove Schubert's handcuffs because "he [had] not been sentenced yet." She immediately directed the marshal to remove the handcuffs and proceeded with sentencing. At the conclusion of the hearing, rather than remanding Schubert to custody, the sentencing judge offered him 14 days to surrender to custody. These actions simply do not manifest actual bias.

Second, Schubert's argument that the handcuffing was orchestrated, signaling a predetermination of his sentence, lacks merit. Assuming that the sentencing judge alerted the marshal that Schubert may be remanded to custody, as Schubert postulates, such communication is permitted under NCJC 2.9(A)(3) ("A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.").

Third, the chief judge's findings, based on a complete review of the record, undermine Schubert's claim. In rejecting Schubert's allegation of actual bias, the chief judge reasoned that no evidence supported his assertion that the sentencing judge discussed sentencing with the marshal before the sentencing hearing. The chief judge was also persuaded by the sentencing judge's affidavit in which she "swore that she had no knowledge in advance that the Marshal would attempt to anticipate the

judge's sentence and 'react proactively' to what the Marshal thought the order would be" and that the sentencing judge attributed the marshal's actions to inexperience. The chief judge's detailed findings are aptly supported by the record, and we agree with her conclusion that handcuffing Schubert was not evidence of actual bias but a simple misunderstanding by the marshal.

Schubert's claim of actual bias based on him being handcuffed falls short of the standard set forth in Cameron. And because that claim fails, he cannot demonstrate that the chief judge manifestly abused her discretion or exercised her discretion in an arbitrary or capricious manner in denying his motion for disqualification on that basis.

Finally, Schubert suggests that his sentence to 9 months' confinement as a condition of probation illustrates the sentencing judge's actual bias against him. Again, we disagree. The sentencing judge explained her reasons for sentencing Schubert as she did—(1) he was an educated and experienced attorney, (2) he used cocaine for six months, and (3) he engaged persons to procure cocaine for him while he was prosecuting individuals for drug offenses. The sentence falls within the range of punishment allowed by statute, see NRS 193.130; NRS 453.336, and there is no indication that the sentencing judge relied on improper evidence in her sentencing decision, see Cameron, 114 Nev. at 1283, 968 P.2d at 1171 (noting this court's repeated refusals to interfere with sentencing decisions where sentence is legal and within statutory limits and not influenced by "highly suspect or impalpable evidence"), and, although 9 months' confinement is significant, we cannot say that it points to actual bias under Cameron. As Schubert failed to prove actual bias, the chief judge did not manifestly abuse her discretion or exercise her

discretion in an arbitrary or capricious manner in denying his motion to disqualify the sentencing judge.

Having considered Schubert's arguments and concluded that they lack merit, we

ORDER the petition DENIED.[3]

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Jennifer Togliatti, Chief Judge
Hon. Carolyn Ellsworth, District Judge
William B. Terry, Chartered
Attorney General/Carson City
Eighth District Court Clerk

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[3]To the extent Schubert complains that the district court erred by not conducting an evidentiary hearing on his motion to disqualify, his claim lacks merit. The chief judge rejected Schubert's request for an evidentiary hearing on two grounds: (1) any evidence produced showing that the sentencing judge had advised the marshal of a possibility of Schubert's incarceration would not have proved actual bias, as such communication was permissible under NCJC 2.9(A)(3) and (2) the record of the proceedings did not support Schubert's contention that the marshal was aware of what the sentence would be. Because Schubert has identified no evidence that would have demonstrated actual bias, we conclude that the chief judge did not manifestly abuse her discretion or exercise her discretion in an arbitrary or capricious manner by denying his request for an evidentiary hearing.

CHERRY, C.J., dissenting:

I respectfully dissent. I would grant the petition.

Cherry, C.J.

Cherry