IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JONAS ALAN THORNTON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. F-2011-962
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

A. JOHNSON, JUDGE:

Appellant Jonas Alan Thornton, was tried and convicted in a non-jury trial for the crime of Assault with a Dangerous Weapon, in violation of 21 O.S.Supp.2006, § 645, in Okmulgee County District Court Case No. CF-2010-61, before the Honorable Kenneth E. Adair, District Judge. Judge Adair sentenced Thornton to ten years imprisonment with five years suspended.

BACKGROUND

The crime for which Thornton was tried and convicted arose from an incident that occurred in the early morning of January 1, 2010. In that incident, Thornton allegedly fired a handgun into a house occupied by his mother's boyfriend Kenneth Morgan, the boyfriend's brother Emmanuel Morgan, and Joseph Pope, a friend of the Morgans. After being arrested and released on bail, Thornton consulted with attorney Kenneth Adair. Although he met with attorney Adair, Thornton eventually hired attorney Carla Stinnett to represent him. Attorney Stinnett withdrew after the preliminary hearing and Thornton then hired attorney Kenneth Butler. Sometime after the meeting with

Thornton, attorney Adair was elected as District Judge for Okmulgee County. Judge Adair presided over Thornton's non-jury bench trial and sentencing.

On July 11, 2013, having reviewed the affidavits included in support of Thornton's claims in this appeal, this Court remanded the case to the district court for an evidentiary hearing on the following issues: (1) Judge Adair's impartiality and failure to recuse himself from the case, and (2) Thornton's claims that trial counsel was ineffective for failing to seek Judge Adair's recusal, not presenting Thornton's wife as an alibi witness, and not obtaining and presenting alibi-corroborating telephone records.

The District Court of Okmulgee County, Judge Douglas Golden, held the required evidentiary hearing on August 30, 2013, and filed his Findings of Fact and Conclusions of Law with this Court on October 8, 2013. Thornton and the State filed their post-evidentiary hearing supplemental briefs with this Court on October 3rd and October 22nd respectively. With the evidentiary hearing and supplemental briefing complete, this appeal is ripe for decision.

Thornton raises the following issues:

(1) whether Judge Adair should have presided over the case because Thornton disclosed personal and confidential information to him during a consultation meeting where Thornton attempted to retain Adair as counsel;

(2) whether the trial court's refusal to give full consideration to Thornton's alibi defense as a sanction for an alleged discovery

violation deprived him of his constitutional right to present evidence;

(3) whether Thornton was denied the effective assistance of counsel by counsel's failure to: (a) present an alibi defense; (b) request that the State provide criminal history reports for its witnesses; (c) object to information presented at sentencing that Thornton did not meet his financial obligations; and (d) seek removal of Judge Adair;

(4) whether the judgment and sentence should be corrected *nunc pro tunc* to reflect that Thornton was convicted of Assault with a Dangerous Weapon; and

(5) whether the cumulative effect of errors deprived him of a fair trial.

Because we reverse and remand for a new trial on the issue of Judge Adair presiding over Thornton's bench trial, the remainder of Thornton's claims are rendered moot. Consequently, we do not address them.

DISCUSSION

Thornton claims the trial judge, Kenneth Adair, should not have presided over the case because Judge Adair was biased against him. According to Thornton, the bias was the result of information Thornton disclosed to Adair when he attempted to hire Adair as his attorney before Adair was elected to the position of district court judge. Thornton contends that with Judge Adair sitting as judge and trier of fact in his case, he was denied a fair trial.

Rule 15 of the *Rules for the District Courts of Oklahoma*, Title 12, Ch. 2, App. (2001), establishes the procedure for disqualifying a judge, and failure to seek disqualification under the procedure prescribed by the rule waives the claim. *Mitchell v. State*, 2006 OK CR 20, ¶ 84, 136 P.3d 671, 705. Thornton did not seek to disqualify Judge Adair under Rule 15. The claim is therefore waived.

Nevertheless, while Thornton's recusal claim is waived, his claim of judicial bias is not. *See Mitchell*, 2006 OK CR 20, ¶ 87, 136 P.3d at 706 ("while a defendant can waive his right to preclude a disqualified judge from hearing his case, that defendant does *not* thereby waive the right to have his trial conducted in a fair and impartial manner"). Because the claim involves the fundamental constitutional due process right to an impartial tribunal, that aspect of the claim is reviewed for plain error. *See Alexander v. State*, 2002 OK CR 23, ¶ 18, 48 P.3d 110, 114 ("Appellant, in this case, never requested recusal, nor alleged any bias on the part of the District Court until he presented his case for appeal to this Court. Appellant's failure to request recusal at the district court level waives the issue of judicial bias for purposes of appeal, restricting this Court's review to plain error. As the issue here addresses Appellant's fundamental right to an impartial tribunal, we will review for plain error.")(internal citation omitted). To be entitled to relief for plain error, Thornton must prove: "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error

affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶38, 139 P.3d 907, 923. "If these elements are met, this Court will correct plain error only if the error 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a 'miscarriage of justice.'" *Hogan*, 2006 OK CR 19, ¶38, 139 P.3d at 923 (quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 700-701).

Title 20 O.S.2011, § 1401 provides that

> A. **No judge of any court shall sit in any cause or proceeding** in which he may be interested, or in the result of which he may be interested, or when he is related to any party to said cause within the fourth degree of consanguinity or affinity, or **in which he has been of counsel for either side**, or in which is called in question the validity of any judgment or proceeding in which he was of counsel or interested, or the validity of any instrument or paper prepared or signed by him as counsel or attorney, **without the consent of the parties to said action entered of record**.

(Emphasis added). The language of this statute is clear: a judge may not preside over any proceeding "in which he has been of counsel for either side . . . without the consent of the parties to said action entered of record." The language of this statute is not a recommended best practice, it is a mandatory directive. And, with its express requirement for on-the-record consent, the statute explicitly rules out any implied waiver of its provisions.

In this instance, the record of the evidentiary hearing shows that while there is some dispute over whether Thornton attempted to retain then-attorney Adair in either a criminal or civil action related to the shooting in this case, the fact remains that he sought Adair's counsel in the matter, a matter that ultimately resulted in this criminal prosecution.[1] In his testimony at the evidentiary hearing, Judge Adair admitted that he formed a limited attorney-client relationship with Thornton when Thornton consulted with him about Officer Stacy's entry into Thornton's home to question Thornton about his role

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[1] Judge Adair testified that his recollection of the office encounter with Thornton was that Thornton sought representation in a possible civil suit against the City of Okmulgee Police Department for Officer Mike Stacy entering Thornton's property without permission to investigate the shooting that Thornton was accused of committing. Thornton, however, testified as follows:

> Q What did you tell Mr. Adair about this case?
>
> A I told him everything that I had been told at that point. You know, that I was arrested and that the warrant had said "Attempted Murder," and that Mr. Morgan was accusing me of shooting at his house. And I mentioned to him about Mike Stacy coming to my house and James Ables, and that I told them to leave and they wouldn't. And just, you know, what I was being accused of. I mean that was all what I – that's pretty much what I knew at the time.
>
> Q Did you mention to Mr. Adair, while you were in his office, any bad blood that you had with any of the Morgans?
>
> A Yes. I told him about an incident that happened about a year, a year-and-a-half before then.

(Tr.Ev.Hrg. at 125-126). During that same meeting, Thornton said Adair told him he "had nothing to worry about and that there was no case, and that it would be thrown out" (Tr.Ev.Hrg. at 126). Judge Adair conceded that it was "in the realm of possibility" that he might have told Thornton that he could "file something to have the charges thrown out" (Tr.Ev.Hrg. at 35).

Thornton further testified that he could not afford to hire Adair so he retained attorney Carla Stinnett who withdrew after the preliminary hearing. He then hired attorney Kenneth Butler who represented him through trial and sentencing.

in the shooting. By its plain language, Section 1401 not only disqualifies a judge who formally entered an appearance in a case and actively represented a party in a proceeding, but also disqualifies a judge who "has been of counsel for either side." Thus, while then-attorney Adair may never have entered a formal appearance in Thornton's criminal case and may have done nothing more than provide some preliminary counsel in the matter, he was obviously "of counsel" to Thornton, albeit in a limited capacity and for a very brief time. Accordingly, under Section 1401, Judge Adair was prohibited from presiding over Thornton's case. *Cf. Pinchback v. Pinchback*, 341 S.W.2d 549, 553 (Tex.Civ.App. 1961)("It is not necessary that the formal relation of attorney and client exist in order for a Judge to become disqualified. One who performs acts appropriate to counsel, such as being consulted or giving advice, may thus become disqualified."). Adair's failure to disqualify himself, therefore, was error.

Nevertheless, the error does not necessarily require automatic reversal. Under plain error review, Thornton must also prove that the error is plain or obvious and that it affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan*, 2006 OK CR 19, ¶38, 139 P.3d at 923. In this instance, while it may not have been plain or obvious to Judge Adair at the time of trial that the defendant before him was someone he had previously counseled on the matter being tried before him,[2] the facts developed at the

[2] Judge Adair testified at the evidentiary hearing that he did not recognize Thornton before trial, but during trial he had a vague recollection of Thornton when he testified about

evidentiary hearing show that Thornton and Adair had actually established an attorney-client relationship, albeit a limited one in this matter. Under Section 1401, therefore, Judge Adair was plainly barred from presiding over the trial as previously having been of counsel to Thornton.

Under plain error review, however, a showing of plain or obvious error is not enough to obtain relief. To secure relief, Thornton must also show that the error affected his substantial rights to the extent that it affected the outcome of the proceeding. Or, in other words, Thornton must show that he was harmed or prejudiced by the error. *See Dawkins v. State*, 2011 OK CR 1, ¶ 19, 252 P.3d 214, 220 ("[w]ithout prejudice, there is no plain error"); *Bland v. State*, 2000 OK CR 11, ¶ 91, 4 P.3d 702, 727 ("[E]rror alone is insufficient to require reversal.").

By its mandatory nature, 20 O.S.2011, § 1401 implicitly presumes that a judge who has acted of counsel for either party in a dispute before him cannot be impartial and is therefore not qualified to preside over the case. *Cf. Dacey v. Connecticut Bar Association*, 441 A.2d 49, (Conn. 1981)(construing similar disqualification statute and holding that if judge comes within statutory criteria for disqualification, disqualification is mandatory). Consequently, when a judge who has acted of counsel for one of the parties to the case in a matter substantially the same as that being tried before the judge, prejudice to the parties is presumed. *Cf. id.* ("no one would seriously argue a judge's

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Okmulgee Police Officer Mike Stacy entering his residence without permission. After this recollection, during a break, Adair inquired of his bailiff if she recognized Thornton, but Adair did not inform anyone else of his recollection.

disqualification where his spouse was a party. Nor could it be contended that those relationships such as master and servant and attorney and client, which would conclusively disqualify a prospective juror; would not also disqualify the judge. 'It is a well-recognized principal of natural justice that a man ought not to be a judge in his own case. Irrespective of any proof of bias or prejudice, the law presumes that a party to a dispute is not disinterested and does not possess the impartiality so essential to proper judicial action regarding it. This absolute disqualification to act rests on sound public policy. Any other rule is repugnant to a proper sense of justice.')(internal citations omitted)(quoting *Ellis v. Emhart Mfg. Co.*, 191 A.2d 546 (1963)). This is especially so in a case such as this where the judge not only presided over the trial process, but also performed the jury function by sitting as the trier of fact. Under these circumstances, the presumed prejudice affected the entire framework of the trial. It therefore requires reversal regardless of the strength of the evidence of guilt. *See United States v. Marcus*, 560 U.S. 258, 263, 130 S.Ct. 2159, 2164-2165, 176 L.Ed.2d 1012 (2010)(discussing plain error methodology and explaining that where an error affects the entire framework within which the trial proceeds, rather than simply being an error in the trial process itself, such error is not "ordinary case" plain error and requires reversal regardless of its impact on outcome of trial); *cf. Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed.2d 749 (1927)(finding that trial judge who should have been disqualified for statutorily created pecuniary interest in case and official motive

to convict was not impartial and therefore reversal was required despite evidence clearly being against defendant). Accordingly, Thornton's conviction and sentence must be reversed and the case remanded for a new trial.

Because we reverse and remand for a new trial, Thornton's remaining claims are moot.

DECISION

The Judgment and Sentence of the district court is **REVERSED** and the case **REMANDED** for new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE KENNETH E. ADAIR, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur
SMITH, V.P.J.: Concur
LUMPKIN, J.: Dissent
C. JOHNSON, J.: Concur

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LUMPKIN, JUDGE: DISSENT

I respectfully dissent. Upon recognizing Appellant at trial, the trial judge should have stopped the proceedings and advised all parties of his prior meeting with Appellant, that he had not "made an appearance" or acted "as a lawyer in the proceeding," and that he held no "personal bias or prejudice concerning [either] party." 20 O.S.2011, § 1401; Rule 2.11, *Oklahoma Code of Judicial Conduct*, Title 5, Ch. 1, App. 4 (2011). However, the record reveals that Appellant was wholly aware of the circumstances. Appellant recalled the meeting, recognized the trial judge but did not disclose this fact to anyone. He waived his right to a jury trial and proceeded to non-jury trial before the trial judge. It was only after the unfavorable verdict that he advised his attorney that he had met the judge. Even then Appellant advised counsel not to seek the trial judge's recusal. Accordingly, any error was invited. Rule 15, *Rules for District Courts of Oklahoma*, Title 12, Ch. 2 App. (2011); *Mooney v. State*, 1999 OK CR 34, ¶ 39, 990 P.2d 875, 887; *Hooper v. State*, 1997 OK CR 64, ¶ 20, 947 P.2d 1090, 1100. As Appellant had not shown actual bias or prejudice in the trial judge's handling of his trial, no relief is required. *Brumfield v. State*, 2007 OK CR 10, ¶¶ 29-30, 155 P.3d 826, 837-38; *Bryan v. State*, 1997 OK CR 15, ¶¶ 27-29, 935 P.2d 338, 354-55; *Long v. State*, 2003 OK CR 14, ¶ 6, 74 P.3d 105, 107. Therefore, I would affirm the Judgment and Sentence.