STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0720

State of Minnesota,
Respondent,

vs.

Troy Michael Bernard,
Appellant.

Filed February 24, 2009
Affirmed
Crippen, Judge[*]

Le Sueur County District Court
File No. 40-CR-07-529

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jason L. Moran, Christian, Keogh, Moran & King, 65 South Park Avenue, P.O. Box 156, Le Center, MN 56057 (for respondent)

Thomas R. Braun, George F. Restovich and Associates, 117 East Center Street, Rochester, MN 55904 (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN , Judge

Appellant Troy Michael Bernard challenges his sentence for first-degree criminal sexual conduct based on the district court judge's failure to recuse. Appellant argues that the judge had an affirmative obligation to recuse under Canon 3D of the Minnesota Code of Judicial conduct because of his acquaintance with the victim's grandmother, who offered evidence at appellant's sentencing hearing. Because the minimal nature of the contacts between the court and the victim's grandmother do not rise to the level whereby the appearance of the judge's impartiality could objectively and reasonably be questioned, we affirm.

FACTS

Appellant was charged with first-degree criminal sexual conduct with a 14-year-old student at the school where appellant was employed as a teacher and coach. Appellant admitted the charges and pleaded guilty in exchange for the state dismissing its motion for an upward departure. At the sentencing hearing, the judge disclosed that he had worked with the victim's grandmother, a court employee, on a number of cases over the years. He also disclosed that he officiated at her wedding several years before and performed some legal services for her while in private practice 16 to 18 years ago. He stated that his relationship with her was not social, but professional only. The judge further stated that he did not feel the need or desire to recuse, but wanted to create the record so that there was clarity as to this issue. The judge assured the parties that if he felt that this relationship would make his job "any more difficult, any more likeable, any

more dislikable than it would be under any circumstance," he would be "the first one to raise [his] hand and tell you otherwise."[1]

The state asked for a guideline sentence of 144 months. The court allowed several family members to read witness impact statements, including the victim's grandmother, who urged the court to give appellant the longest sentence allowed by law. The court denied appellant's motion for a dispositional departure and did not follow the downward durational departure recommended sua sponte from the correction agent, sentencing appellant to the guideline sentence.

D E C I S I O N

Judicial ethics are governed by the Code of Judicial Conduct. Minn. Code Jud. Conduct preamble. Canon 3D(1)(a) of the code states:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

A judge who is disqualified under the Code of Judicial Conduct cannot preside over a trial or other proceeding. Minn. R. Crim. P. 26.03, subd. 13(3). Whether a judge

[1] The state argues that this case turns on the fact that the district court then suggested appellant take time to talk with counsel in private about this matter, to which appellant responded, "I'm fine." The state contends that appellant waived his right to object to the judge's handling of his sentencing hearing by agreeing to go forward at this point in the proceeding. However, we do not base our decision on the state's waiver theory. We give no weight to the comments elicited by the court from appellant on this topic in deciding this case, other than as corroboration of our assessment that the court deliberately and assuredly put aside any personal connections to deliberate on the difficult issue of the case.

has violated the Code of Judicial Conduct is a question of law which this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

> The code does not set forth any exceptions to the rule in Canon 3D(1) that a judge must disqualify herself if her impartiality may reasonably be questioned, nor does it provide a precise formula that can automatically be applied in making a disqualification determination. Further, the grounds for disqualification in Canon 3D(1) are stated broadly, leaving considerable room for interpretation in their application to any given set of circumstances. When reviewing a judge's decision not to disqualify herself, [a reviewing court] must make an objective examination of whether the judge's impartiality could reasonably be questioned.

Id. at 248 (quotations omitted). Disqualification is not only required when impropriety objectively exists, but also when there is an appearance of partiality. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993). However, this appearance standard requires recusal only when impartiality can reasonably be questioned, and not because "a litigant subjectively believes that the judge is biased." *Id*.

An objective examination of the facts on the record reveals that the judge's familiarity with the victim's grandmother is not alone sufficient to give rise to a reasonable question of his impartiality or his bias. *See State v. Yeager*, 399 N.W.2d 648, 652 (Minn. App. 1987) (stating that a judge's familiarity with a *party* is not sufficient to show prejudice). Here, the judge knew one of the victim's family members, not a party to this case. The record disclosed a sporadic professional relationship only, not a significant relationship, such as the longstanding attorney-client relationship of the judge

and the law firm representing the appellant in *Powell v. Anderson,* 660 N.W.2d 107, 118-19 (Minn. 2003).

Our conclusion is ratified not only by the minimal nature of the contacts but also by the judge's definite pronouncement of impartiality, the record of his thorough and even-handed deliberation on the difficult issue before the court, and the absence of any suggestion in the record that his decision was shaped by the sentencing statements furnished by the parties.[2]

Affirmed.

[2] Both parties applied the balancing test used by the United States Supreme Court in *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 2205 (1988) and adopted by the Minnesota Supreme Court in *Powell*, 660 N.W.2d at 121 to the facts of this case to determine whether the judge's failure to recuse was reversible error. However, the *Powell* court employed this balancing test to determine whether the judge's failure to disqualify himself required our opinion to be vacated only *after* it had already concluded that the judge should have disqualified himself based on an objective examination of the facts that revealed that the judge's impartiality was subject to reasonable question. *Id.* at 119-21. Because we conclude that the objective weighing of the judge's contacts here does not give rise to a reasonable question of the judge's impartiality, we do not need to engage in this balancing test between the interests of finality and the interests, if any, affected by these contacts – including any appearance of impartiality.