



At that hearing and without objection, Judge Kelly received the preliminary hearing transcript from Appellant's Custer County matter into evidence. Judge Kelly reviewed the transcript and found Appellant had violated his probation; however, at Appellant's request he set off the punishment decision until completion of Appellant's jury trial on the new case. The following month the Custer County jury found Appellant guilty of Child Abuse and returned a verdict for ten (10) years imprisonment. On June 16, 2011, Judge Kelly revoked the suspension order in full thereby directing execution of the remaining nine (9) years and nine (9) months of Appellant's concurrent sentences. These revoked sentences are running consecutively to Appellant's Custer County sentence.

Appellant now appeals the revocation order and raises five propositions of error. As this Court finds Appellant entitled to reversal under his first proposition, those remaining propositions need not be addressed.

Appellant's Proposition I asserts that Appellant "was denied a fair and impartial hearing on the State's Motion to Revoke because the presiding judge at the revocation hearing [was the Assistant District Attorney who] prosecuted Appellant in earlier stages of the same case." (Br. of Appellant 9.) In this regard, the appeal record reveals that Judge Kelly, prior to becoming the Associate District Judge for Washita County, served as an Assistant District Attorney in Washita County, and in that capacity, filed the Arson and Conspiracy charges against Appellant and personally prosecuted Appellant to conviction. According to the record, as Assistant District Attorney, Judge Kelly represented the State in the waiver of preliminary hearing, the amending of the charges from first to second degree arson, in the negotiated nolo pleas from Appellant given for the State's recommendation of partially suspended, ten-

year, concurrent sentences, and which sentences would be conditioned on rules of probation personally approved by Judge Kelly as State's counsel.

The minimum due process standards established by the U.S. Supreme Court in probation revocation proceedings call for such proceedings to be before an "independent decisionmaker" or "neutral and detached hearing body."<sup>1</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62, 36 L.Ed. 2d 656 (1973). To fulfill that requirement, Oklahoma's statutes require revocations to be brought before the sentencing court by "petition . . . filed by the district attorney with the clerk of the sentencing court." 22 O.S.2011, § 991b(A). The "petition set[s] forth the grounds for such revocation" and it is to be presented with "competent evidence justifying the revocation . . . to the court at a hearing to be held for that purpose." *Id.* In placing revocations before the sentencing court, the Legislature has presumed those statutes and canons regulating trial court judges will assure a decisionmaker meeting the due process standards for hearings on revocation petitions.

One such statute is that at 20 O.S.2011, § 1401(A), which states, "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 in which he has been of counsel for either side, . . . without the consent of the parties to said action entered of record." This provision, however, was not followed in Appellant's matter. Although this Court has distinguished the situation where

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<sup>1</sup> In *Alexander v. State*, 2002 OK CR 23, ¶ 18, 48 P.3d 110, 114, this Court found in the context of Drug Court terminations (a proceeding that has been likened to other forms of probation terminations) that a Drug Court probationer has a "fundamental right to an impartial tribunal." Recognizing that a Drug Court team judge's participation in a Drug Court probationer's treatment, monitoring, and evaluation presents a situation that "could compromise the impartiality of a district court judge assigned the responsibility" of being a "final adjudicator in a termination proceeding," this Court declared that the Drug Court team judge must recuse whenever a probationer in Drug Court termination proceeding objects to that judge hearing the matter. *Alexander*, ¶¶ 20-21, 48 P.3d at 115.

a revocation judge has, as a former prosecutor, prosecuted a defendant on a separate case that occurred prior to that case that is before him on revocation, this Court has never authorized a judge to hear a motion to revoke a suspended sentence that he personally procured when serving as a prosecutor.<sup>2</sup>

The State's Answer Brief asserts this error has been waived by Appellant's lack of objection to Judge Kelly presiding over the revocation proceeding. That, argument, however, ignores the lack of disclosure by Judge Kelly of his prior involvement in Appellant's case and ignores the mandatory language in Section 1401(A) requiring waiver to be on the record.<sup>3</sup> Moreover, this argument does not account for the fact that this incident has all the markings of plain error.<sup>4</sup>

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<sup>2</sup> *Sam v. State*, 1973 OK CR 264, ¶¶ 17-18, 510 P.2d 978, 981 ("The fact that [trial judge] had prosecuted the defendant in a previous case does not, by itself, show prejudice on the part of the judge. Other jurisdictions have held that the fact that the judge was the District Attorney who had prosecuted the defendant for previous crimes was not sufficient to disqualify him.") *overruled on other grounds Buis v. State*, 1990 OK CR 28, ¶ 9, 792 P.2d 427, 430. *Cf. Bryan v. State*, 1997 OK CR 15, ¶ 27, 935 P.2d 338, 355 ("The mere fact that a trial judge may have previously represented a defendant or presided over a prior unrelated case does not require disqualification.").

<sup>3</sup> "No judge of any court shall sit in any cause . . . in which he has been of counsel for either side . . . without the consent of the parties to said action entered of record." 20 O.S.2011, § 1401(A) (emphasis added).

<sup>4</sup> To show "plain error" justifying relief on appeal, the appealing party must prove the following:

- 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. 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 v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (citations omitted). Additionally, this Court has observed, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and the right to "an impartial judge" is one of those. *Bartell v. State*, 1994 OK CR 59, ¶ 15, 881 P.2d 92, 97. Lastly, we recognize that revocation hearings are not criminal trials, and therefore they do not carry the full panoply of constitutional rights that accompany such trials. This being so, cases involving criminal trials

In urging that this Court reject this claim, the State has not cited to any decision that would uphold such a ruling and affirm a judge's revocation where the judge, as a former government attorney, was personally involved in obtaining the suspended sentence that he revoked and failed to disclose that personal involvement prior to hearing the revocation. Where other jurisdictions have addressed such circumstances, they have concluded that the probationer must be granted relief.<sup>5</sup>

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and cases involving revocations do not always lend themselves to direct comparisons. In this instance, however, as we have identified above, in *Scarpelli* the Supreme Court denoted the need for a neutral/independent decisionmaker in revocation hearings; hence, to the extent that criminal trials depend on the same, we need not be overly concerned about such comparisons where the issue is that of judge neutrality.

<sup>5</sup> Two examples of such cases are *Small v. Commonwealth*, 617 S.W.2d 61 (Ky. Ct. App. 1981), and *Ex parte Miller*, 696 S.W.2d 908 (Tex. Cr. App. 1985). In reversing for a new revocation hearing before a different judge, the Kentucky Court of Appeals in *Small* found:

We need not go into appellant's allegations of bias or prejudice because we feel that under these circumstances, where it appears that Judge Paxton, in his role as Commonwealth's attorney, participated in the plea bargaining of appellant's original sentence, Judge Paxton should have disqualified himself under K.R.S. 26A.015(2)(e) which states that:

Any justice or judge of the Court of Justice . . . shall disqualify himself in any proceeding where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

There is some discussion in appellee's brief of the unlikelihood of Judge Paxton remembering his role in appellant's earlier plea, but we feel this is irrelevant. . . .

Further, K.R.S. 26A.015(2)(b) provides that a judge shall disqualify himself in any proceeding in which he or she had previously served as a lawyer in the matter in controversy.

While a probation or parole revocation is not part of a criminal prosecution, *Gagnon v. Scarpelli, supra*, we feel it is sufficiently related to the underlying criminal action as to present the appearance of impartiality which is "next in importance on to the fact itself."

*Small*, 617 S.W.2d at 63 (citations omitted).

In a post-conviction habeas action brought by the applicant in *Miller*, the Texas Court of Criminal Appeals declared a judgment against the applicant revoking her probation to be "null and void" on finding "that the record in the instant case indicated the trial judge actively participated in applicant's trial as state's attorney and such conduct disqualifies him from presiding as judge in a subsequent probation revocation hearing." *Miller*, 696 S.W.2d at 910, *overruled in part by Ex parte Richardson*, 201 S.W.3d 712, 714 (Tex. Crim. App. 2006) (where

**DECISION**

The final order of the District Court of Washita County, revoking the suspended portions of Appellant's concurrent sentences in Case No. CF-2001-38, is **REVERSED AND REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY  
THE HONORABLE CHRISTOPHER S. KELLY, ASSOCIATE DISTRICT JUDGE

**APPEARANCES AT TRIAL**

OLIVIA WALDKOETTER  
823 FRISCO  
CLINTON, OKLAHOMA 73601

ATTORNEY FOR DEFENDANT

DENNIS SMITH  
DISTRICT ATTORNEY  
MEGAN SIMPSON  
ASSISTANT DISTRICT ATTORNEY  
WASHITA COUNTY COURTHOUSE  
111 E. MAIN STREET  
CORDELL, OKLAHOMA 73632

ATTORNEYS FOR STATE

**OPINION BY: SMITH, V.P.J.**

LEWIS, P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR  
RA

**APPEARANCES ON APPEAL**

KIMBERLY D. HEINZE  
OKLA. INDIGENT DEFENSE SYSTEM  
P.O. BOX 926  
NORMAN, OKLAHOMA 73070

ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
THEODORE M. PEEPER  
ASSISTANT ATTORNEY GENERAL  
313 NORTHEAST 21ST STREET  
OKLAHOMA CITY, OKLAHOMA 73105

ATTORNEYS FOR APPELLEE

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habeas "applicant was aware at trial [of the revocation motion] that the trial judge was subject to disqualification, but he instructed counsel to proceed with the plea anyway" that would confess the motion to revoke, the disqualification issue was therefore known and "could have been raised on direct appeal"; hence, *Miller* would be overruled to the extent that it would permit a disqualification issue of which applicant was aware of at the time of trial to be asserted for the first time in a post-conviction habeas proceeding).