IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTONIO GARCIA ELLIS,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

No. MA-2000-1022

ORDER GRANTING APPLICATION FOR A WRIT OF MANDAMUS

On August 3, 2000, Petitioner, by and through counsel Michael S. "Mickey" Homsey, filed an application for writ of mandamus in Case No. CF-1999-218, in the District Court of Oklahoma County, requesting this court to direct the Honorable Susan P. Caswell, District Judge of Oklahoma County, to disqualify herself from presiding at Petitioner's upcoming trial in *State of Oklahoma v. Antonio Garcia Ellist.* Petitioner states that he is charged in Case No. CF-1999-218 with Murder in the First Degree, Attempted Robbery with a Firearm, and an alternative count, Murder in the First Degree during Commission of a Felony.

The Honorable Susan P. Caswell denied Petitioner's motion to disqualify herself following a hearing on July 12, 2000. On July 18, 2000, as required by Rule 15, *Rules for District Courts of Oklahoma*, Title 12, Ch.2, App.1 (1999), Petitioner filed a motion requesting the Chief Judge of Oklahoma County to disqualify Judge Caswell and reassign the case to another district judge for trial. On July 20, 2000, the Honorable Bryan C. Dixon, Chief Judge, recused himself from hearing Petitioner's application and the matter was then set for hearing before the Presiding Judge, the Honorable Nancy L. Coats. Following a hearing

before Judge Coats on July 27, 2000, the matter was taken under advisement. Petitioner's application was denied on July 31, 2000, and Petitioner now seeks extraordinary relief in this Court.

In support of Petitioner's application, he sets forth the following grounds for seeking Judge Caswell's disqualification:

1. Petitioner complains that he has been in jail without bond awaiting trial that has been continued four times at the State's request to further its search of the lake at Willow Cliff Apartments while the lake has been drained "in search of a weapon of dubious evidentiary value." Judge Caswell did not demand any legal authority from the prosecution for the lake draining but accepted, in full without legal authority, that this lake would be drained, and then did what she could to stay out of the negotiations on how it would be done but used her authority and power of the bench to see that it was, in fact, done. When Petitioner's counsel questioned the lack of authority behind the lake draining, "Judge Caswell-without hearing, argument, or demanding authority from the prosecution-summarily ruled that Petitioner lacked standing to object to the search, and therefore, lacked standing to object to how it was done."

   Petitioner also argues that Judge Caswell's May 1, 2000, order directing the Warr Acres Police to search the lake is not approved by anyone and is simply signed by her contrary to Local Rule 22, Official Rules of the Seventh Judicial Administrative District, which directs that "No instrument shall be presented to a judge for signature unless it has been approved by the attorneys of record affected by it except where the matter has been settled in accordance with Rule 11."

2. "The deep and illicit prejudice shown by the trial court as an additional vehicle for the prosecution is shown further when Mr. Wintory, the prosecutor, had *ex parte* communications with the trial judge concerning the progress of the lake draining." Petitioner argues that "[t]he powerful connection and shared values between the prosecution and Judge Caswell further came to bare [sic] at the June 9, 2000, hearing which ended with Mayor Pike being ordered to be available 'every minute 24 hours a day'." Petitioner asserts that no pleading of any kind was filed by the prosecution for this hearing, no notice whatsoever was given to Petitioner's counsel, nor did he even know of the existence of this hearing, and that this hearing was ordered by the trial judge solely upon the *ex parte* request of the prosecution. Petitioner argues that the transcript of the hearing shows "the atmosphere of intimidation and collusion between the prosecution and the trial court." Local Rule 5 prohibits *ex parte* communications on the substance of a pending case with the assigned judge.

3. Petitioner argues that Judge Caswell's "ruling on due diligence without testimony shows further the prejudice and bias in favor of the

prosecution." Due diligence of the prosecution concerning the lake draining was at issue at a June 15, 2000, hearing. A second hearing was held on June 16, 2000, at which the prosecution requested a continuance to continue the search of the lake and Petitioner asserts that the issue of due diligence reoccurred "but unlike the [trial court's] pronouncement of June 15, Judge Caswell contradicted herself and, without evidentiary hearing, held that the prosecution was, in fact, exercising due diligence." However, at the disqualification hearing, Petitioner argues that the trial judge contradicted herself again when she stated: "...So although I take all lawyers at their word who come into my courtroom, as they are officers of the court, just as I am, I certainly would not make a ruling on due diligence without some evidence that would be before me."

4. "Exacerbating the situation further is Judge Caswell's campaign for the bench. In her campaign pursuant to several written articles ..., Judge Caswell makes it clear that she would 'fight for rights of victims'." Petitioner argues: "The violations of law and the lack of cold neutrality shown by [Judge Caswell] in this case makes sense when compared to the campaign statements she made. Judge Caswell is doing exactly what she promised to do – that is, to skew the law against alleged criminal defendants and to show favor towards the victims. The appearance of impropriety and prejudice is quite glaring."

5. Petitioner also argues that he has been denied due process, that "[a]s is clearly shown from the transcripts and exhibits herein, there were several hearings Counsel was not informed of, nor did he know these hearings were even had." The June 9, 2000, hearing is an example. "Petitioner's counsel was given no notice; there were no pleadings filed; and this hearing was had based solely on the ex parte communication from the prosecutor, Mr. Wintory, with Judge Caswell. There has been no hearing afforded Petitioner on the issue of standing, nor has there been a hearing concerning the State's due diligence. There has been no authority provided by the prosecution to support the lake draining; and no demand for such authority from Judge Caswell regarding the lake draining."

Petitioner concludes:

"He demands his right to a speedy jury trial and his right for that trial to be presided over by a fair and impartial judge. It will be impossible for this Petitioner to receive a fair trial in front of Judge Caswell. The appearance of bias standing is clear and unequivocal. Judge Caswell's summary rulings without argument or even a hearing; no demand for notice given to the Petitioner for several hearings; her threats and intimidation of the elected official of a political subdivision; and her allowances of side-stepping the law in favor of the prosecution, is a testament of her appearance of partiality, prejudice and bias."

On July 31, 2000, the Honorable Nancy L. Coats, District Judge, denied Petitioner's motion for Judge Caswell's disqualification finding the following:

1. The trial judge's former status as a prosecutor in and of itself does not illustrate bias under the circumstances presented.

2. There is no evidence to support the claim that the trial judge acted outside the scope of her authority by ordering the City of Warr Acres to undertake the steps and obligations necessary to drain the lake in search of a firearm used in the crime with which Defendant is charged.

3. There are insufficient facts to support a finding of prejudice or personal bias of the trial judge or to question her impartiality.

In an Order issued August 11, 2000, Respondent or her designated representative was directed to file a response to Petitioner's application. The response by Judge Caswell, by and through John Jacobsen, First Assistant District Attorney, was filed in this Court on August 28, 2000.

For a writ of mandamus, Petitioner has the burden of establishing (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999).

Petitioner's complaints about the trial judge's rulings concerning the discussions that involved the City of Warr Acres and the inappropriate *ex parte* communications with the State, raise questions of Judge Caswell's impartiality. "Every person accused of crimes is entitled to nothing less than the cold neutrality of an impartial judge, and where the circumstances are of such a nature as to cause doubts as to the impartiality of a judge, the error, if any, should be made in favor of the disqualification rather than against it, for the reason that the state has an interest in the standing, integrity, and reputation of its courts." *State ex rel Vahlberg v. Crismore*, 90 Okla.Cr.244, 247, 213 P.2d 293 (1949). Canon 3(E)(1) of the *Code of Judicial Conduct*, directs that a judge "should disqualify himself or herself in a proceeding in which the judge's

impartiality might reasonably be questioned." 5 O.S.Supp.1999, ch.1, app.4, Canon 3(E)(1). The test imposed by Canon 3 has been stated as follows:

> "Would a person of ordinary prudence in the judge's position *knowing all of the facts* known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" The question is not whether the judge was impartial in fact, but whether another person, *knowing all of the circumstances*, might reasonably question the judge's impartiality - whether there is an appearance of impropriety.

Ex parte Sanders, 659 So.2d 1036, 1038 (Ala.Crim.App.1995) (citation omitted) (emphasis added). Or stated another way, "a reasonable person, *knowing all the facts*, [would] conclude that the trial judge's impartiality could reasonably be questioned." *United States v. Thompson*, 76 F.3d 442, 451 (2d Cir.1996) (brackets in original) (emphasis added). (*See also* Canon 2 which directs that a judge should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.") Our courts must be presided over by unprejudiced, unbiased, impartial and disinterested judges and all doubt and suspicion to the contrary must be jealously guarded against. *See Castleberry v. Jones*, 68 Okla.Cr. 414, 99 P.2d 174, 179 (1940).

The Oklahoma Constitution guarantees a defendant the right to a fair, impartial trial not tainted by any prejudice or personal bias of the trial judge. The decision to recuse is within the discretion of the trial court and the denial of a recusal motion is reviewed for abuse of discretion. *See Fitzgerald v. State*, 1998 OK CR 68, ¶ 10, 972 P.2d 1157; Okla.Const. art. II, § 6. In this case we find an abuse of discretion as the facts demonstrate an appearance of impropriety.

Accordingly, Petitioner's application for writ of mandamus in Case No. CF-1999-218, in the District Court of Oklahoma County, requesting this court direct the Honorable Susan P. Caswell, District Judge of Oklahoma County, to

disqualify herself from presiding at Petitioner's upcoming trial in *State of Oklahoma v. Antonio Garcia Ellis*, is **GRANTED**. The matter is **REMANDED** to the District Court for further proceedings consistent with this Order.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 4th day of October, 2000.

RETA M. STRUBHAR, Presiding Judge

Join in Judge Lile's Dissent

GARY L. LUMPKIN, Vice Presiding Judge

CHARLES A. JOHNSON, Judge

Chas S. Chapel (specially Concurring)

CHARLES S. CHAPEL, Judge

Steve Lile Dissent writing attached.

STEVE LILE, Judge

ATTEST:

Clerk

CHAPEL, J., SPECIALLY CONCURRING:

After reading the papers filed in this appeal my first thought was, what in the world in going on at the Oklahoma County Courthouse? And, although it gives me no pleasure to do so, it is necessary in my judgment, to set out in detail the bizarre happenings in this case in the hope that they will never be repeated by any judge in this State.

Judicial systems throughout the world may be broadly described as either inquisitorial or adversarial. Russia, Japan and most European countries have inquisitorial systems. The prosecutor in most of these systems functions as an arm of the judiciary. The accused does not enjoy the presumption of innocence and the judge may and does actively participate in the investigation of the defendant's guilt. Great Britain, the United States and most common law countries, of course, have adversarial systems. In our system the judicial, prosecutorial and defense functions are all independent and the accused enjoys the presumption of innocence until convicted. Our system goes to great lengths to maintain judicial independence. Thus, it is improper for a judge to have private, or *ex parte*, communications with either the prosecution or the defense. The judge in our system is supposed to be an independent unbiased arbiter. Anything that a judge does in a case, with only rare exception, can only be done after notice to both parties and an opportunity for both parties to be heard as to any issue. A judge is not a prosecutor.

In this case the record indicates there was a complete breakdown of the system. Judge Caswell allowed her office to become an investigative arm of the prosecutor. The record is replete with *ex parte* communications, hearings, and an order entered without notice to Ellis or his counsel. Indeed, there are many serious and scary problems in this record, but the most serious difficulty is that in her zeal to assist the prosecution, this judge unilaterally and illegally denied the defendant in this case the benefits of our adversarial system; instead she functioned as an inquisitorial judge.

The record here has serious irregularities which constitute more than just an appearance of impropriety. Indeed, the record before us would compel Caswell's disqualification even if she had never run improper advertisements to gain her office.[1] During the first hearing on his motion to disqualify, Ellis's counsel remembered his college years living in a fraternity house annex and remarked that walking into Caswell's courtroom was like walking into the District Attorney's annex, because the District Attorney got anything he wanted. I agree. In these proceedings Judge Caswell turned her office into an investigative arm for the District Attorney. She admitted it.[2] Judge Caswell

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[1] *Michael West v. the Honorable Susan P. Caswell*, Case No. MA 2000-425 (June 30, 2000) (Chapel, concurring in result) (not for publication). I believe it is entirely reasonable to conclude, as did the Advisory Panel, that Caswell's ads indicated a preannounced approach to deciding criminal cases. She promised voters she would be biased in favor of the prosecution. Moreover, I believe it is entirely reasonable to conclude that her actions in this case evince an intent to carry out her campaign promises. I therefore continue to believe she should be disqualified in all criminal cases for bias.

[2] July 12, 2000 Transcript of Motion for Disqualification at 37. *See also* June 9, 2000 Transcript of Lake Status Proceedings at 15-16 (Judge Caswell states she ordered the city of Warr Acres to participate in the investigation although outside their jurisdiction and notes the "numerous hearings before this court over the last month" to resolve the lake-draining issues).

had *ex parte* communications with the prosecutor. She admitted it.[3] She neither gave Ellis notice of proceedings in his case nor knew whether counsel received notice of those proceedings, including a hearing. She admitted it.[4] She held one hearing at the prosecutor's *ex parte* request without any pleadings filed or notice to the parties.[5] She held another hearing within minutes after the prosecutor filed a motion. Ellis had no notice of the first hearing, and was not offered time to respond to the State's motion until the second hearing was in progress. Judge Caswell entered an Order requiring the City of Warr Acres and its Mayor to take steps with the Warr Acres Police Department to search a private lake outside Warr Acres city limits to find a weapon. This Order was neither presented to nor approved by attorneys for all interested parties, as required by the court rules. Judge Caswell later orally confirmed that Order covered any request the Oklahoma County Assistant District Attorney prosecuting the case might make, and required the Mayor of Warr Acres to be available to the Assistant District Attorney 24 hours a day.[6] Over trial counsel's objection Judge Caswell allowed the prosecutor to respond when she was asked whether she would set a deadline for endorsing late

[3] June 9, 2000 Transcript of Lake Status Proceedings at 3.
[4] July 12, 2000 Transcript of Motion for Disqualification at 36.
[5] June 9, 2000 Transcript of Lake Status Proceedings; Affidavit of Dave Shumake.
[6] June 9, 2000 Transcript of Lake Status Proceedings 25-26. At page 12, the prosecutor demands that the Mayor be available to him at all times because "we have got to have access to this fellow". At page 29 Judge Caswell states the Order is intended to cover the problems the prosecutor described during the hearing.

witnesses, then repeated the prosecutor's conclusion that she should not set a deadline.[7]

The State's case against Ellis is apparently based to some extent on a jailhouse snitch with four birthdates and six Social Security numbers. The snitch told police that Ellis threw a gun into an apartment complex's private lake. Police dragged the lake with metal detectors. No gun. They sent down divers. No gun. They searched with magnetometers. Still no gun. Finally, in April 2000, they decided to drain the lake. This decision eventually involved the Mayor and city of Warr Acres, the apartment complex owners, and nearby homeowners. Several discussions and hearings took place in Judge Caswell's courtroom or chambers, and she issued the Order described above. All these proceedings were in this case, *State v. Ellis*. However, Ellis's counsel was not notified of any of these proceedings. On May 1, as Ellis tried to object to the financing for the lake draining, Caswell summarily ruled without a hearing that Ellis had no standing to contest the lake search. Ellis received no notification of any further proceedings regarding the lake draining. Again, all of these proceedings took place in his case, *State v. Ellis*. How on earth a judge could allow proceedings to take place in a case without notice to a party is beyond me.[8]

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[7] June 15, 2000 Tr. at 18.

[8] There may be other ways the State could apply to have the lake drained – for example, applying to another judge for a search warrant – and Ellis might not have standing to contest a properly ordered search. However, whether or not he had standing to contest a search he is entitled to notice and an opportunity to be heard on every proceeding in his case. Also, if

Judge Caswell and the State admitted engaging in *ex parte* communication, and admitted that Ellis was not notified of proceedings held in his case. Their excuse is that the lake draining was a "sideshow".[9] This makes no sense. Either the State drained the lake in a serious effort to corroborate snitch testimony and find the murder weapon – an essential part of the State's case – or it had no good reason. Judge Caswell insisted throughout these proceedings that the former was true, and she was involving herself to further the State's ability to investigate the case and keep it moving. She also stated she had Ellis's right to a speedy trial in mind, even though she consistently overruled his objections to continuances on that ground. If this was so, then Ellis should have been notified about every proceeding in his case. If the lake draining truly was a sideshow then Judge Caswell should not have continued the case for four months so the State could complete it.

This behavior is inexcusable. At best it shows a complete failure to understand the defendant's position in a criminal case. At worst it shows a willingness to bend the rules to assist one party. Judge Caswell is correct in believing that the police and prosecutor are required to thoroughly investigate a case. She is incorrect in her apparent belief that the trial court is required to assist in this investigation. In any event, these proceedings are highly

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Judge Caswell was ordering a search (which should be based on affidavits with a finding of probable cause), she should not also be the trial judge in the case.

[9] It does appear that the lake draining turned into something of a sideshow. However, there is a very good question as to who is responsible for the fiasco; the judge or the State. It is difficult to see how the defendant could be responsible for the sideshow since he was not even afforded notice regarding those proceedings.

irregular. In *West* we indicated that any irregular behavior appearing to favor the State must raise a question as to Judge Caswell's impartiality. Judge Caswell should be disqualified from hearing this case.

LILE, J.: DISSENTS

Petitioner argues five (5) propositions in support of disqualification of the trial judge.

THE LAKE DRAINING

A jail-house informant has told prosecutors that the Petitioner admitted having disposed of a murder weapon in the lake at Willow Cliff Apartments. This lake has been drained and searched pursuant to an order of the trial court and apparently no gun was found.

Petitioner first argues that the trial court had never required legal authority to be presented by the prosecutors in justification of the search order and that this failure is evidence of bias or prejudice on the part of the trial court. Without explanation for the inconsistency, Petitioner then states that: "The prosecution, as well as, Judge Caswell, relies on *Dodd v. State*, 2000 OK CR 2, _____ P.2d _____, for authority to search this lake by draining."

Petitioner then argues that the *Dodd* case does not give such authority and that the judge is biased and prejudiced against him because the judge misapplied *Dodd*. However, the law is that: "Adverse rulings against a litigant, even if erroneous, are insufficient to establish a judge's bias or prejudice and are not grounds for disqualification." 46 Am. Jur. 2d §168.

Petitioner complains that the trial judge ruled that Petitioner had no standing to object to this search or to object to how it was done. Right or

wrong, this legal decision is not grounds for disqualification. It may have been subject to appeal or prohibition, but it does not show bias or prejudice. Petitioner's counsel did not question the ruling or present argument; he left the courtroom. Further, Petitioner conceded the point, later saying that: "I haven't even attended the court on most of those deals [hearings involving the lake draining] because I don't have any standing in that as far as what goes on at the lake . . ."

Petitioner states that: "Then she did what she could to stay out of the negotiations on how it would be done but used her authority and power of the bench to see that it was, in fact, done." Petitioner attaches a transcript of one such lake draining hearing and an affidavit of the attorney for the City of Warr Acres which clearly establish that the judge "pushed" the parties involved to complete the search as quickly as possible. This was done, as expressed by the trial court, because: "Everybody here knows the time constraints that are on this court and that are on the State to give this defendant a speedy trial." I am at a loss to find prejudice or bias against the Petitioner from this hearing transcript and affidavit. No one has requested that we review these matters to determine whether the City of Warr Acres has a valid complaint. The trial court specifically stated that the search was ordered "so that this weapon could or could not be found in that lake." At one point Petitioner's counsel stated: "I wish they could dig this lake down to China to find whether or not there's a gun in it." Both the prosecution and the Petitioner had an interest in speedy

completion of this search. If the gun was found, the State could argue that this corroborated the testimony of a jail-house informant. If the gun was not found, the defendant could argue that the jail-house informant was lying.

Petitioner states that the order for the search did not bear his signature for approval as to form, in violation of a local court rule. This issue was not raised before Judge Coats. Petitioner does not explain how this failure shows bias or prejudice against Petitioner. The City of Warr Acres may have a valid objection; however, their case is not before us.

EX PARTE COMMUNICATIONS

It is apparent that the prosecuting attorney had an ex parte communication with the trial judge to the effect that there were problems with the lake draining and that a hearing was required. There is no evidence that anything more was communicated. The substance of the later hearing concerned the details and timing of draining the lake and the importance of the Mayor or a representative being available. I fail to see how these matters, even if irregular from the stand point of the City of Warr Acres, evince prejudice or bias toward Petitioner. The necessity of completing the search as quickly as possible was driven by Petitioner's right to a speedy trial. The evidence which results from all of these actions by the trial court is apparently favorable to Petitioner. The mere assertion of ex parte communication without any averment of how the communication establishes bias is insufficient to support a disqualification. If

an ethics violation has occurred, that is a matter to be pursued through the Court on the Judiciary and the Bar Association.

DUE DILIGENCE

Petitioner objected to the short time between notification and hearing on the State's Motion for Continuance heard on June 16, 2000. Apparently the trial court was going to be unavailable for a week or more and the hearing was set quickly so that the parties would know before the day of trial if a continuance was going to be granted. Petitioner consented to the hearing at that time. The trial court stated: "Are you telling me - - if you need more time to respond to this motion, I can put it off. You're entitled to some time to respond to it. It just seemed to me as a practical matter you lawyers would prefer to know what my ruling's going to be on this motion so that you can do the appropriate things you need to do next week. But if you are not prepared to respond to this motion, then I will set it off."

Petitioner agreed and proceeded to argue the motion. The trial court granted the continuance and offered three dates for trial: Sept. 25, October 2nd and October 16th. Petitioner's counsel stated he wanted the earliest possible date. Petitioner then selected October 2nd. At this hearing Petitioner made no objection that the State was not entitled to a continuance on the grounds that they had not pursued the search with due diligence. In fact, Petitioner's counsel stated to the same judge at a hearing the previous day that: "I know that there has been a lot of due diligence in this case, . . ."

Petitioner now complains that the court's determination that the State had pursued the lake draining with due diligence was legally incorrect. The transcripts provided by Petitioner as exhibits to his Petition setting forth the history of the efforts to complete the lake draining do not support that conclusion nor his assertion that this ruling indicates bias or prejudice, actual or perceived. It would have been impossible for Judge Coats to have found grounds to disqualify the trial judge based upon this unfounded claim.

CAMPAIGN

Here Petitioner argues that the campaign ad, which was at the root of this court's resolution of the *West* case,[1] compels disqualification. These cases are different on the facts. The evidence is uncontroverted that the trial judge had left the district attorney's office when this crime was committed. This is not a child abuse case. The argument made here, similar to the argument

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[1] In *Michael West v. Caswell,* Case No. MA-2000-425 (June 30, 2000) (not for publication), the Judge who wrote a specially concurring opinion announced that he believes that: "Judge Caswell has promised to be biased generally in criminal cases" and should be disqualified "from hearing this case and any other criminal case." This conclusion appeared to be based largely upon what he determined to be Caswell's response to *Judicial Ethics Opinion* 98-15, ____ P.2d ____, 1998 OK JUD ETH 15, i.e. her "response was to continue running the ad." The finding that the improper ad was run intentionally after the ethics opinion was issued, restates the allegation first made by West's counsel in a Reply Brief filed in the *West* case which was not authorized by our rules. (Rule 10.4 Rules of the Oklahoma Court of Criminal Appeals, Title 22 O.S. Ch. 18 App. (2000) provides for a response, upon order of the court, but makes no provision for a reply.) In the case before us today, this same trial judge insists that the ad in question ran once after the Ethics Opinion was issued, in a newsletter that had been placed before the ethics opinion and that could not be pulled. However, I find no legal rationale in *West* that helps to resolve the case before us today. West was a decision supported by three judges and one of those votes was a vote of "Concur in Result" which under our rules means that "the voting judge agrees with the result reached in the majority opinion, but does not agree with the rationale used." Rule 3.13 B. (3), Rules of the Court of Criminal Appeals, Title 22 O.S. Ch. 18 App. (2000).

made in the "concur in result" opinion in *West*, has been rejected by a majority of this court and there is no reason to revisit it.

DUE PROCESS

It is clear that Petitioner should have been notified of all hearings concerning the lake draining if only because those hearings were conducted in this case. However, demand for notice was never made and in fact Petitioner's counsel walked out of the first of those hearings. Petitioner never requested notice and, in fact, later confirmed that he voluntarily absented himself from the hearings. For the reasons discussed above, the failure of notice, right or wrong, is not evidence under all of these facts and in view of the actions of Petitioner's counsel, of bias, implied or actual.

I would sustain the ruling made by Judge Coats in this case and deny disqualification of the trial judge. I am hereby authorized to state that Judge Lumpkin joins in this Dissent.