

IN THE SUPERIOR COURT OF GORDON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	:	CRIMINAL INDICTMENT
	:	NO. 16471 FILED
vs.	:	Clerk Superior Ct., Gordon County
	:	AUG 08 2005
JERRY WILLIAM JONES,	:	Brian Brannon
	:	Clerk
Defendant	:	

ORDER ON DEFENDANT'S MOTION
FOR RECUSAL OF JUDGE G. CAREY NELSON

Judge Carey Nelson has been assigned to preside over the above styled case. In exercising this responsibility he convened court on Monday, July 18, 2005, to conduct an evidentiary hearing on the defendant's Motion to Dismiss the Indictment Due to the Unconstitutional Composition of the Grand Jury. As a result of the conduction of the hearing the defendant's attorney filed a Motion for Recusal on July 25, 2005. Giving consideration to the weekend dates of July 23 and July 24, the filing of the Motion on Monday, July 25, 2005, would be timely within the requirements of Uniform Superior Court Rule 25.1. Judge Nelson forwarded the Motion to the Chief Judge of the Cherokee Judicial Circuit on July 29, 2005. Pursuant to Uniform Superior Court Rule 25.4(C)(1), the Chief Judge selected himself to hear the Motion and enters this Order accordingly.

The case was referred to the Chief Judge without the requisite determinations that (1) the Motion was timely filed; (2) the Affidavit was legally sufficient and (3) assuming the

alleged facts were true recusal would be warranted. Because these findings were not made by the referring Judge it is proper for the assigned Judge to make the determinations. Birt vs. The State, 256 Ga. 483 (1986). The Court finds the Motion was timely filed.

Uniform Superior Court Rule 25.6 provides that the assigned Judge may consider the motion solely on the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. Pursuant to that Rule this Court exercises its discretion to rule solely on the affidavit.

The Motion to Recuse is based upon the fact that a potential witness, the Seventh District Court Administrator, Jody Overcash, was not sequestered during the hearing. The Motion to Recuse was also based upon Judge Nelson's statement that Jody Overcash was "here to assist the Court". The defense attorney extrapolates that Ms. Overcash is the Court's "assistant" and refers to her as such throughout the Motion, and the Motion to Recuse alleges that Judge Nelson could not be impartial because his "assistant" would be a material witness in the case.

This Court will first address the issue of sequestration. The Official Code of Georgia Annotated §24-9-61 provides that:

"...a party shall have the right to have the witness of the other party examined out of the hearing of each other. The court shall take proper care to effect this object as far as practicable and convenient, but no mere irregularity shall exclude a witness."

The trial court is vested with broad discretion with the rule of sequestration. Stevens v. The State, 247 Ga. 698 (1981). Even in a death penalty case it has been held that there was no abuse of discretion when the trial judge allowed the chief investigating officer to remain in the courtroom during the trial of the case. Davis v. The State, 242 Ga. 901 (1971). In Kendrick vs. The State, 123 Ga. App. 785 (1971), it was held to be appropriate to allow an expert to remain in

attendance as an exception to the Rule of Sequestration when it was necessary to consider technical information presented during the trial.

It was within Judge Nelson's discretion to allow Jody Overcash to remain in the courtroom, and this would not be a bias for recusal.

In the case of Birt v. The State, 256 Ga. 483 (1986), the Supreme Court of Georgia set forth criteria for determining when recusal may be warranted. The Court held:

"The alleged bias of the judge must be 'of such a nature and intensity to prevent the defendant ...from obtaining a (trial) uninfluenced by the court's prejudgment.' To warrant disqualification of a trial judge the affidavit supporting the recusal motion 'must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment' "

Judge Nelson made the statement that Jody Overcash was "here to assist the Court".

Contrary to the attorney's affidavit Judge Nelson did not refer to Ms. Overcash as his assistant, and an implication that she was his personal assistant would be incorrect. The Court takes judicial notice of the fact that Ms. Overcash is personally acquainted with Judge Nelson.

Personal acquaintance, however, would not be a ground for recusal for a judge. Judges regularly, routinely and appropriately have continuing professional relationships with District Attorneys, defense attorneys and other court officials. To require recusal in every case where such ~~professional~~ relationships exist would make the operation of the courts impossible.

Judges are customarily required to decide facts and issues involving attorneys, law enforcement officers and other individuals with whom the Judge may have some relationship. To require recusal in all such situations would effectively mean that a judge could only preside in areas outside his or her own home environs. There is no such strict standard, and the Georgia

Supreme Court in Smith vs. The State, 250 Ga. 438 (1983) recognized that practical considerations must be applied in recusal motions and noted that to rule otherwise would mean “no judge might ever rule but once upon a disputed question of law or factual circumstances without forever thereafter being disqualified from hearing similar matters”. This obviously would be an unreasonable situation. In the Smith case, recusal was not required of a judge presiding in a case involving a particular laboratory system, even when that judge had been **instrumental in initiating the use of that laboratory and had made public statements regarding its accuracy.**

The defense attorney complains that Judge Nelson received extrajudicial communications from Ms. Overcash by way of e-mail after the hearing. This Court notes, however, that the e-mail was directed to the defense attorney, Chris Adams, with a copy to Carey Nelson, through the Gordon County Clerk’s Office e-mail address. There has been full disclosure to the defense of the communications.

The defense attorney complains that they have not had the opportunity to cross-examine Jody Overcash with regard to extrajudicial communications. As previously noted, the extrajudicial communications were made directly to the defendant’s attorney, and a more **appropriate remedy** would be to request the opportunity to cross-examine Ms. Overcash about those communications rather than recuse a Judge who received the same communications as the defense attorney.

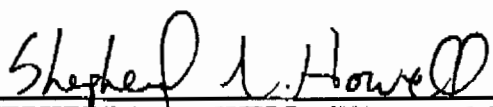
Recusal would not be required, even in a death penalty case, where a reasonable person would not conclude, assuming the truth of all alleged facts, that the judge harbored a bias stemming from an extrajudicial source, which is of such a nature and intensity that it would

impede the exercise of impartial judgment. Speed v. The State, 270 Ga. 699 (1999).

For all the foregoing reasons this Court finds that the defense attorney's affidavit is legally insufficient, and that assuming the alleged facts are true, recusal would not be warranted because it has not been demonstrated that Judge Nelson would be incapable of resolving the constitutionality of the composition of the Gordon County Grand Jury with impartiality.

THEREFORE, IT IS HEREBY THE ORDER OF THIS COURT that Defendant's Motion for Recusal of Judge G. Carey Nelson is denied.

SO ORDERED this 5th day of August, 2005.



**SHEPHERD L. HOWELL, CHIEF JUDGE
SUPERIOR COURTS - CHEROKEE
JUDICIAL CIRCUIT**

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

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	:	
vs.	:	
	:	
JERRY WILLIAM JONES,	:	
	:	
Defendant	:	

CERTIFICATE OF SERVICE

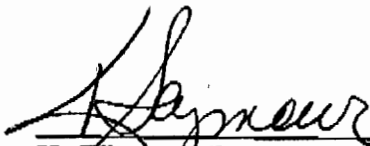
This is to certify that I have forwarded a copy of the attached Order on
Defendant's Motion to Recuse Judge G. Carey Nelson to the following:

Christopher Adams, Esquire
E. Michelle Drake, Esquire
225 Peachtree Street, NE
Suite 900
Atlanta, Georgia 30303

T. Joseph Campbell, District Attorney
135 W. Cherokee Avenue
Cartersville, Georgia (BY HAND DELIVERY)

Judge G. Carey Nelson
135 W. Cherokee Avenue
Cartersville, Georgia 30120 (BY HAND DELIVERY)

This 5TH day of August, 2005.



KAREN W. SEYMOUR, SECRETARY
TO JUDGE SHEPHERD L. HOWELL