

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE AMBROSIO T. OGUMORO,
Petitioner.

Supreme Court No. 2014-SCC-0022-PET

Superior Court No. 12-0134

OPINION

Cite as: 2015 MP 9

Decided December 4, 2015

Edward C. Arriola, Saipan, MP, for Petitioner.

George L. Hasselback, Saipan, MP, for Respondent.

BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; HERBERT D. SOLL, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Petitioner Ambrosio T. Ogumoro (“Ogumoro”) seeks a writ of mandamus to order the recusal of the trial court judge (“trial judge”) from this case. Alternatively, he petitions for a writ of prohibition to prevent the trial judge from presiding over this matter. Ogumoro asserts the trial judge erred by presiding over this case after appointing a special prosecutor and making a probable-cause determination in support of an arrest warrant for Ogumoro. For the reasons below, we DENY the petition.¹

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On August 17, 2012, the trial judge granted an ex parte petition filed by the Office of the Public Auditor’s legal counsel, George Hasselback (“Hasselback”), appointing Hasselback as a special prosecutor in the case against former Attorney General Edward T. Buckingham. The special prosecutor’s duties were “limited to the investigation and prosecution of matters or persons that are connected or relevant to the charges filed in [the *Buckingham*] case.” *Commonwealth v. Buckingham*, Crim. No. 12-0134 (NMI Super. Ct. Aug. 17, 2012) (Granting Ex Parte Pet. for Appointment of Special Prosecutor at 4).

¶ 3 Nearly seven months after the appointment, the trial judge issued an arrest warrant for Ogumoro, Buckingham’s alleged co-conspirator. Hasselback charged Ogumoro with one count of Conspiracy to Commit Theft of Services, one count of Theft of Services, two counts of Conspiracy to Commit Obstructing Justice, two counts of Obstructing Justice, eight counts of Misconduct in Public Office, and one count of Criminal Coercion.

¶ 4 This matter halted when we stayed all proceedings involving Buckingham’s alleged co-conspirators in *In re San Nicolas*, 2013 MP 8, pending an evidentiary hearing on the Office of the Attorney General’s disqualification from such matters. Following our order in *In re San Nicolas*, *id.* ¶ 24, the trial judge scheduled a hearing, allowing only the Office of the Attorney General (“OAG”) and the Office of the Public Auditor (“OPA”) to present arguments. The trial judge later canceled the hearing because the parties stipulated to the appointment of a special prosecutor.

¶ 5 Before this matter was assigned to the trial judge here, a different judge recused because he presided over Buckingham’s criminal case, where he heard incriminating testimony about Ogumoro. This prompted Ogumoro to move for this trial judge’s recusal pursuant to 1 CMC § 3308(a)² because the judge

¹ This opinion is consistent with the September 11, 2015, order denying writ relief.

² Section 3308(a) requires disqualification if the judge’s “impartiality might reasonably be questioned.”

reviewed information contained in the affidavit supporting the arrest warrant against Ogumoro and made a probable-cause determination on that basis. The trial judge denied the motion.

¶ 6 Ogumoro now petitions for a writ of mandamus or prohibition.³

II. JURISDICTION

¶ 7 We have jurisdiction over a writ petition. NMI CONST. art. IV, § 3; 1 CMC § 3102(b).

III. DISCUSSION

¶ 8 Ogumoro seeks a writ of mandamus ordering the trial judge's recusal or a writ of prohibition preventing his continued appointment in this matter.

¶ 9 "Writs, whether of mandamus or prohibition, are extraordinary relief granted only in the 'most dire of circumstances.'" *In re San Nicolas*, 2013 MP 8 ¶ 9 (quoting *In re Buckingham*, 2012 MP 15 ¶ 7). We balance five factors to determine whether a writ is proper: (1) the lack of other adequate means for relief, (2) the potential damage or prejudice to the petitioner that cannot be corrected on appeal, (3) the clear error by the trial court, (4) the recurrence of the trial court's error or the "persistent disregard of applicable rules," and (5) the novelty and importance of the issue. *Tudela v. Super. Ct.*, 2010 MP 6 ¶ 6 (citing *Tenorio v. Super. Ct.*, 1 NMI 1, 9–10 (1989)). The five factors are applicable to both writs of mandamus and prohibition. *Id.* For a writ to be granted, clear error must be shown. *In re Buckingham*, 2012 MP 15 ¶ 10. Clear error will only be found when no "rational and substantial legal argument can be made in support of the questioned . . . ruling even though on normal appeal a reviewing court may find reversible error." *Id.* (internal quotation marks omitted) (quoting *Xiao Ru Liu v. Super. Ct.*, 2006 MP 5 ¶ 17).

A. Clearly Erroneous Decision

¶ 10 We first consider whether the trial court's decision was clearly erroneous because this factor is dispositive. *In re Commonwealth*, 2015 MP 7 ¶ 9. Ogumoro argues the trial judge clearly erred by refusing to recuse because he made a probable-cause determination in support of the arrest warrant and engaged in ex parte contacts with the OAG and the OPA.

¶ 11 The standard for judicial recusal is governed by 1 CMC § 3308(a). In reviewing § 3308, we consider the statutory language; Commonwealth case law; and federal precedent interpreting the counterpart federal recusal statute, 28 U.S.C. § 455. *Tudela*, 2010 MP 6 ¶ 8. Section 3308(a), derived from § 455, is an objective standard mandating a judge's disqualification "in any proceeding in which his or her impartiality might reasonably be questioned." Under the federal standard, a trial judge must recuse when "a reasonable person with knowledge of

³ The trial judge requested that this matter be resolved without oral argument. Under Supreme Court Rule 27(a)(2), only parties may file a motion to request specific relief. Because the trial judge is not a party to this case, the request to submit the case without argument is impermissible.

all the circumstances would harbor doubts about the judge's impartiality." *Commonwealth v. Caja*, 2001 MP 6 ¶ 19 (citation omitted); *see also Saipan Lau Lau Dev., Inc. v. Super. Ct.*, 2000 MP 12 ¶ 5 (citation omitted) (articulating the reasonable-person standard).

1. Probable-Cause Determination

¶ 12 Ogumoro argues the trial judge's failure to recuse after making a probable-cause determination constitutes clear error because: (1) the previous trial judge, like this judge, heard incriminating evidence about him, and thereafter recused; and (2) this trial judge prejudged the case by concluding there was probable cause to support the arrest.

¶ 13 In *Bank of Saipan v. Superior Court*, we expressly disavowed the notion that a trial court's decision binds another court. 2001 MP 7 ¶ 21 (citing *Starbuck v. City & Cnty. of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977)). Ogumoro's first argument therefore fails.

¶ 14 Ogumoro's second claim conflates the probable-cause standard with the conviction standard. A probable-cause determination "makes no judgment on the merits of the case . . . [and] does not bear on the guilt or innocence of the accused." *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 15; *see also State v. Blunt*, 751 N.W.2d 692, 698 (N.D. 2008) ("[k]nowledge of facts sufficient to establish guilt is not necessary to establish probable cause.") (alteration in original) (citation omitted) (internal quotation marks omitted)). This argument is fatal to Ogumoro's request for extraordinary relief.

¶ 15 Furthermore, a reasonable person understands the difference between a probable-cause ruling and a meritorious decision. *See In re Sherwin-Williams Co.*, 607 F.3d 474, 478 (7th Cir. 2010) (acknowledging that a reasonable person understands the significance of facts in light of the applicable legal standards). A reasonable person recognizes that a judge making a probable-cause ruling is not prejudging the merits, but rather, making a preliminary determination on the likelihood the defendant committed a crime. *See Garcia v. Cnty. of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011) (requiring a fair probability that one committed a crime based on the "totality of the evidence" to establish probable cause (internal citation omitted)). Thus, a reasonable person would not "harbor doubts" about the trial judge's impartiality, and the trial judge was not required to recuse. Because there is a rational argument that supports the trial judge's decision, Ogumoro fails to demonstrate the trial court clearly erred in declining to recuse.⁴

⁴ Moreover, a judge's involvement in pretrial matters, such as making a probable-cause determination in support of an arrest warrant, does not create "any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence." *Withrow v. Larkin*, 421 U.S. 35, 56 (1975); *cf. Liteky v. United States*, 510 U.S. 540, 551 (1994) ("It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."); *cf.*

2. *Ex Parte Contacts*

¶ 16 Next, we determine whether the trial court clearly erred in allegedly engaging in ex parte contacts. Ogumoro asserts the ex parte contacts occurred at the hearing appointing a special prosecutor and at the evidentiary hearing.

¶ 17 Ogumoro’s argument is predicated on the ex parte nature of the trial court proceedings. Ex parte communications occur outside the presence of interested parties in a matter and improperly advances certain parties’ interest. *In re Lizama*, 2008 MP 20 ¶ 10. As Ogumoro concedes, not all ex parte contact requires recusal; rather, the circumstances of the ex parte contact determine whether a reasonable person might question a judge’s impartiality. *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1219 (9th Cir. 2014). In both trial court proceedings, the OAG and the OPA were the only interested parties in deciding whether a special prosecutor was appropriate. Because the appointment of a special prosecutor did not involve Ogumoro,⁵ his ex parte argument is meritless. As such, a reasonable person would not question the trial judge’s impartiality. Ogumoro is unable to satisfy the clear error standard because there is a rational argument supporting the trial judge’s decision to preside over this matter.⁶

IV. CONCLUSION

¶ 18 For the foregoing reasons, we DENY Ogumoro’s petition for a writ of mandamus or prohibition.

SO ORDERED this 4th day of December, 2015.

Minks v. Commonwealth, 427 S.W.3d 802, 806 (Ky. 2014) (“The federal circuits . . . agree that a judge is not disqualified from later participating in the case by virtue of the fact that he or she issued the search warrant in the case.”); *State v. Chamberlin*, 162 P.3d 389, 394 (Wash. 2007) (“Judges in criminal matters routinely must evaluate the existence of probable cause or oversee preliminary hearings. . . . The weight of legal authority supports the position that no inherent prejudice or bias arises from this scenario.”).

⁵ We decline to address Ogumoro’s due process argument because he was not a party to the special prosecutor appointment and evidentiary proceedings.

⁶ We do not turn to the other factors for writ relief because Ogumoro does not demonstrate the trial court’s decision was clearly erroneous.

/s/ _____
JOHN A. MANGLONA
Associate Justice

/s/ _____
ROBERT J. TORRES
Justice Pro Tem

/s/ _____
HERBERT D. SOLL
Justice Pro Tem