FSM SUPREME COURT APPELLATE DIVISION

MASTER HALBERT, Petitioner, vs. CHIEF JUSTICE CYPRIAN MANMAW, in his official capacity as the Presiding Justice in Criminal Case No. 2014-501, Respondent.	)	APPEAL CASE NO. P7-2015

Decided: November 27, 2015

BEFORE:

Hon. Aliksa B. Aliksa, Specially Assigned Justice, FSM Supreme Court*
Hon. Mayceleen JD Anson, Specially Assigned Justice, FSM Supreme Court**
Hon. Arthur R. Barcinas, Specially Assigned Justice, FSM Supreme Court***

*Chief Justice, Kosrae State Court, Tofol, Kosrae
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
*** Judge, Guam Superior Court, Hagatna, Guam

APPEARANCE:

For the Petitioner: Lorrie Johnson-Asher, Esq.
Chief Public Defender
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P.O. Box PS-174
Palikir, Pohnpei FM 96941

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HEADNOTES

Courts – Recusal

Disqualification of a Supreme Court trial division justice is governed by 4 F.S.M.C. 124, which in § 124(1) requires disqualification if the justice's impartiality could reasonably be questioned, and in § 124(2) requires a justice's disqualification if the justice concludes that he falls within the statutory provisions, and in § 124(2)(a) requires disqualification when the justice has a personal bias or prejudice concerning a party or his counsel, or personal knowledge of disputed evidentiary facts concerning the proceeding. Halbert v. Manmaw, 20 FSM R. 245, 248 (App. 2015).

Mandamus and Prohibition – Authority and Jurisdiction

Under 4 F.S.M.C. 117, the FSM Supreme Court has a constitutional power to issue all writs, including writs of prohibition. Halbert v. Manmaw, 20 FSM R. 245, 248 (App. 2015).

Courts – Recusal; Mandamus and Prohibition – When May Issue

In order for the Supreme Court to issue an extraordinary writ of prohibition overruling a trial judge's denial of a motion to disqualify, the trial judge's ruling must be an abuse of discretion. Halbert v. Manmaw, 20 FSM R. 245, 248, 250 (App. 2015).

Mandamus and Prohibition – Nature and Scope

A writ of prohibition is an extraordinary remedy and may only prevent a clear abuse of discretion; it may not be used to overrule a trial judge's sound exercise of discretion. Halbert v. Manmaw, 20 FSM R. 245, 248-49 (App. 2015).

Courts – Recusal

When a party moves to disqualify a trial judge, the party is attacking that judge's perceived bias or conflict of interest. Halbert v. Manmaw, 20 FSM R. 245, 249 (App. 2015).

Mandamus and Prohibition – When May Issue

The court may issue a writ of prohibition only when the party seeking a writ has met his burden to show that his right is clear and indisputable. Halbert v. Manmaw, 20 FSM R. 245, 249, 250 (App. 2015).

Mandamus and Prohibition – Nature and Scope

The determination of whether to grant a writ of mandamus or prohibition involves the court's full recognition of the extraordinary nature of the relief requested, and no writ will issue if the petitioner has not first established that the trial judge had a duty and violated it. Though the power is curative, it is strong medicine and its use must be restricted to the most serious and critical ills. Halbert v. Manmaw, 20 FSM R. 245, 249 (App. 2015).

Courts – Recusal – Procedure; Mandamus and Prohibition – Procedure

A petition for a writ of prohibition to disqualify a trial court judge is procedurally deficient when it includes a lone exhibit which reflects the trial judge's order; when there is no affidavit stating the reasons for the belief that grounds for disqualification exist; when it lacks a memorandum of points and authorities; and when it includes a motion to stay that does not properly belong before the appellate division since it should have been filed in the trial court. Halbert v. Manmaw, 20 FSM R. 245, 249 (App. 2015).

Courts – Recusal – Extrajudicial Knowledge

The general rule is that the jurist's knowledge of disqualifying facts must have originated from an extrajudicial source. A disqualification must be made on the basis of conduct which is extrajudicial in nature, that is, on some basis other than what the judge learned from his participation in the case. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Judicial Statements or Rulings

Rulings made by a judge in the course of prior proceedings do not provide grounds for disqualification. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Extrajudicial Knowledge

It has long been regarded as normal and proper for a judge to sit in the same case upon its remand. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Procedure; Mandamus and Prohibition – Procedure

A petitioner for a writ of prohibition must allege facts that show an appearance of partiality. Without a supporting affidavit, the purported facts underpinning the allegation are absent, and only the

petitioner's subjective assertions remain, and when the petitioner's unsupported allegations that the judge is not impartial are purely speculative, they are insufficient to support his disqualification. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Judge's Duty

In the absence of a showing of any partiality or extrajudicial bias under 4 F.S.M.C. 124(1), a judge is obligated to hear cases assigned to that judge. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Bias or Partiality

Information that a judge learned or events that occurred during the course of a judicial proceeding cannot disqualify the judge on the grounds that the events or information now cause him to be biased or prejudiced or create an appearance of impropriety. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal – Judicial Statements or Rulings

Adverse rulings made in the course of judicial proceedings do not provide grounds for disqualification under 4 F.S.M.C. 124(1). Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal; Mandamus and Prohibition – When May Issue

A petitioner seeking a writ of prohibition to disqualify a trial judge must show an abuse of discretion, as the appellate court will not merely substitute its judgment for that of the trial judge. Halbert v. Manmaw, 20 FSM R. 245, 250 (App. 2015).

Courts – Recusal; Mandamus and Prohibition – When May Issue

A petition for a writ of prohibition to disqualify a trial judge will be denied when it neither meets the burden of showing the that the judge harbors bias or prejudice nor shows that any disqualifying knowledge was derived from an extrajudicial source since the mere fact that the judge made an adverse evidentiary ruling and declared a mistrial does not mean the judge's impartiality might reasonably be questioned. Halbert v. Manmaw, 20 FSM R. 245, 251 (App. 2015).

Courts – Recusal; Criminal Law and Procedure – New Trial

A defendant whose trial ended in a mistrial is entitled to a new trial, but not a new judge. Halbert v. Manmaw, 20 FSM R. 245, 251 (App. 2015).

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COURT'S OPINION

PER CURIAM:

On October 2, 2015, the Trial Division of the FSM Supreme Court rendered a Decision in FSM v. Master Halbert, Criminal Case No. 2014-501, which denied the Petitioner's Motion to Disqualify. On October 12, 2015, Petitioner filed the instant Petition for a Writ of Prohibition; Motion to Stay October 2, 2015 Order.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying criminal matter proceeded to trial on April 13,2015. Prior to the commencement of the Government's case in chief, the Petitioner, by and through counsel, took issue with a bench ruling on a motion *in limine* about the admissibility of witness testimony made using Skype, a

teleconferencing software program. The Petitioner moved to stay the case pending appeal, and the trial court denied the motion and issued a Memorandum and an Order accordingly. [FSM v. Halbert, 20 FSM R. 42 (Pon. 2015).] The following day, the Petitioner filed a Motion to Disqualify the Presiding Jurist: Temporary Justice Cyprian Manmaw. Temporary Justice Manmaw is the Respondent in this writ petition. The motion was denied from the bench. The trial commenced on April 13, but on the following day the Petitioner's counsel refused to continue. On July 3, 2015, the trial court declared a mistrial.

By and through newly appointed counsel, the Petitioner filed a Motion for Recusal of the Respondent on September 16, 2015. The Government opposed the motion two days later, and the Petitioner replied on September 23. On September 30, 2015, a telephonic hearing took place.

The hearing centered on a the following issues: 1) Whether a judge who had declared a mistrial could oversee the subsequent trial, notwithstanding the fact that evidentiary rulings had been made; and 2) Because the admissibility of the evidence involved a case of first impression in this jurisdiction, whether the challenged jurist could preside over the new trial without creating an appearance of impropriety.

Disqualification of a Trial Division Supreme Court Justice is governed by 4 F.S.M.C. 124. § 124(1) requires disqualification if the Justice's impartiality could reasonably be questioned. 4 F.S.M.C. 124(1). § 124(2) requires a Justice to disqualify if the Justice concludes that he falls within the statutory provisions. 4 F.S.M.C. 124(2). Most relevantly, § 124(2)(a) requires disqualification: "where [the Justice] has a personal bias or prejudice concerning a party or his counsel, or personal knowledge of disputed evidentiary facts concerning the proceeding." 4 F.S.M.C. 124(2)(a).

The trial judge found that the mere fact that he had heard testimony at the first trial would not impact his ability to preside over the new trial. The Petitioner's suggestion that the impartiality of the Respondent might reasonably be questioned because his judge's prior rulings were unfavorable to the Petitioner was similarly discounted.

The October 2, 2015 Order clarified that the Respondent harbored no misgivings about his ability to preside over the retrial with an open-mind, and to adjudicate the case without preconceived notions created by testimony in the mistrial. The retrial would be approached as if it were a clean slate.

On October 12, the Petitioner filed a Petition for a Writ of Prohibition; Motion to Stay October 2, 2015 Order.

DISCUSSION

I. Jurisdiction and Standard of Review for Issuance of a Writ of Prohibition

The Petitioner has brought this application for a Writ of Prohibition pursuant to FSM Rule of Appellate Procedure 21(a) and 4 F.S.M.C. 117. Under § 117, the FSM Supreme Court has a constitutional power to issue all Writs, including Writs of Prohibition. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007).

In order for the Supreme Court to issue an extraordinary Writ of Prohibition overruling a trial judge's denial of a motion to disqualify, the trial judge's ruling must be an abuse of discretion. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM R. 1, 4 (App. 1997); Berman v. FSM Supreme Court (I), 7 FSM R. 8, 10 (App. 1995); Nahnken of Nett v. Trial Division, 6 FSM R. 339, 340 (App. 1994); Ruben v. Petewon, 14 FSM R. 177, 184 (Chk. S. Ct. App. 2006). In other words, a Writ of

Prohibition is an extraordinary remedy and may only prevent a clear abuse of discretion; it may not be used to overrule a trial judge's sound exercise of discretion. Etscheit, 14 FSM R. at 600. When a party moves to disqualify a trial judge, the party is attacking that judge's perceived bias or conflict of interest. McIlrath v. Amaraich, 11 FSM R. 502, 505 (App. 2003).

A Writ of Prohibition may only be issued when the party seeking a writ has met his burden to show that his right is "clear and indisputable." Senda v. Trial Division, 6 FSM R. 336, 338 (App. 1994). "The determination of whether to grant a writ of mandamus or prohibition involves the court's full recognition of the extraordinary nature of the relief requested." Etscheit, 14 FSM R. at 600 (citing Federated Shipping Co. v. Trial Division, 9 FSM R. 270, 272-73 (App. 1999)). "Though the power is curative, it is strong medicine and its use must be restricted to the most serious and critical ills." Etscheit, 14 FSM R. at 600. No Writ of Prohibition shall issue if the petitioner has not first established that the trial judge had a duty and violated it. *See* Gimnang v. Trial Division, 6 FSM R. 482, 485 (App. 1994).

II. Analysis of Petitioner's Writ

A. *Procedural Deficiencies*

The subject Petition for a Writ of Prohibition; Motion to Stay October 2, 2015 Order is procedurally fatally flawed. The Petitioner's filing falls short of the requirements for a Petition for a Writ of Prohibition, which are set forth in Rule 21(a) of the FSM Rules of Appellate Procedure. Rule 21(a) requires:

> The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.

FSM App. R. 21(a).

The application includes a lone Exhibit which reflects the trial Judge's October 2, 2015 Order. 4 F.S.M.C. 124(6) requires, "an affidavit stating the reasons for the belief that grounds for disqualification exist," and no such affidavit is affixed to the Petition. The Court is left with the mere averments set forth in the Petition itself. It is not the Court's responsibility to search the record for error, the parties must clearly denote those portions of the record that support their respective arguments. *See* Nakamura v. Bank of Guam, 6 FSM R. 224, 228 (App. 1993).

The present filing also lacks a memorandum of points and authorities. Aside from citing a lone case of arguably marginal relevance and reciting 4 F.S.M.C. 124, the Petition only consists of two paragraphs. Because the Petitioner neglected to provide legal support for his arguments in a separately labeled memorandum of points and authorities, the Petition for Writ of Prohibition is insufficient. *See* FSM Social Sec. Admin. v. Weilbacher, 17 FSM R. 217, 228 (Kos. 2010).

Finally, this Court notes that although the filing in issue is entitled: Petition for a Writ of Prohibition; Motion to Stay October 2, 2015 Order, the latter relief requested does not properly belong before the Appellate Division. A motion to stay the October 2 Order should have been filed in the trial court.

B. *Substantively Inadequacies*

Even assuming for the sake of argument that the above-mentioned procedural flaws did not exist, the Petitioner's argument fails to persuade. The Petitioner claims that the challenged Jurist declared a mistrial in the present case, and having made an evidentiary ruling that was unfavorable to the Petitioner, the Respondent might harbor some preconceived notions concerning the retrial.

At the outset, this Court finds Petitioner's reliance on 4 F.S.M.C. 124(2)(a) to be clearly misplaced. The general rule is that the jurist's knowledge of disqualifying facts must have originated from an extrajudicial source. Isaac v. Saimon, 14 FSM R. 33, 35 (Kos. S. Ct. Tr. 2006). "A disqualification must 'be made on the basis of conduct which is extrajudicial in nature' that is, 'on some basis other than what the judge learned from his participation in the case.'" FSM v. Wainit, 13 FSM R. 293, 295 (Chk. 2005) (quoting FSM v. Jonas (II), 1 FSM R. 306, 318 (Pon. 1983)).

The Respondent's alleged "personal knowledge of disputed evidentiary facts concerning the proceeding," arose from the first trial rather than an extrajudicial source. Rulings made by a judge in the course of prior proceedings do not provide grounds for disqualification. *See* Allen v. Kosrae, 13 FSM R. 55, 59 (Kos. S. Ct. Tr. 2004).

In Liteky v. United States, the United States Supreme Court recognized what is commonly referred to as the "extrajudicial source rule," and noted: "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand." Liteky v. United States, 510 U.S. 540, 551, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474, 488 (1994). The Petitioner is incorrect to argue that 4 F.S.M.C. 124(2)(a) disqualifies the Respondent from presiding over the retrial, because the Respondent's knowledge is not extrajudicial.

Lastly, the Petitioner contends that challenges the Respondent's impartiality might reasonably be questioned, given the facts to which he has been exposed in the previously commenced trial. 4 F.S.M.C. 124(1) states: "A Supreme Court Justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 4 F.S.M.C. 124(1).

The Petitioner must allege facts that show an appearance of partiality. FSM v. Wainit, 11 FSM R. 424, 432 (Chk. 2003). Without a supporting affidavit, the purported facts underpinning the allegation are absent, and only the Petitioner's subjective assertions remain. In the absence of a showing of any partiality or extrajudicial bias under 4 F.S.M.C. 124(1), a judge is obligated to hear cases assigned to that judge. *See* Hartman v. Bank of Guam, 10 FSM R. 89, 98 (App. 2001).

The Petitioner's unsupported allegations that the Respondent is not impartial are purely speculative, and are insufficient to support his disqualification. *See* Berman v. Rosario, 15 FSM R. 337, 341 (Pon. 2007). Furthermore, information that a judge learned or events that occurred during the course of a judicial proceeding cannot disqualify the judge on the grounds that the events or information now cause him to be biased or prejudiced or create an appearance of impropriety. *See* FSM v. Jonas (II), 1 FSM R. 306, 318 (Pon. 1983). Even adverse rulings made in the course of judicial proceedings do not provide grounds for disqualification under 4 F.S.M.C. 124(1). Wainit, 11 FSM R. at 295.

Finally, a petitioner seeking a writ of prohibition to disqualify a trial judge must show an abuse of discretion, and the appellate court will not merely substitute its judgment for that of the trial judge. Jano v. King, 5 FSM R. 326, 330 (App. 1992).

A Court which possesses the power to issue Writs of Prohibition, may only do so if the petitioner has met his burden to show that his right is clear and indisputable. Nikichiw v. Petewon, 15 FSM R.

33, 37 (Chk. S. Ct. App. 2007). As set forth above, this Court finds that the Petitioner has not adequately demonstrated that he has a clear and indisputable right to the relief requested. Any ruling to the contrary would amount to overruling the Respondent's exercise of sound discretion.

CONCLUSION

The Petition does not meet the burden of showing the Respondent harbors bias or prejudice, nor does it show that any disqualifying knowledge was derived from an extrajudicial source. The mere fact that the Respondent made an adverse evidentiary ruling and declared a mistrial does not mean the Respondent's impartiality might reasonably be questioned. The Petitioner is entitled to a new trial, but not a new judge.

Accordingly, this Court hereby DENIES the Petition for Writ of Prohibition.

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FSM SUPREME COURT APPELLATE DIVISION

PACIFIC SKYLITE HOTEL, CAPTAIN OSIAS CAMACHO, WILLIAM OMPOY, THEODY PLAZA, ERNESTO GOMEZ, ANTERO PULMANO, and GEOFREY DELICA,

Appellants,

vs.

PENTA OCEAN CONSTRUCTION COMPANY LTD. and TATSUNOSKE NISHIBA individually and as Administrative Manager of PENTA OCEAN CONSTRUCTION COMPANY LTD.,

Appellees.

APPEAL CASE NO. P7-2014

ORDER DISMISSING APPEAL

Ready E. Johnny
Associate Justice

Decided: December 9, 2015

APPEARANCE:

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