FILED
APR 2 0 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DAVID JAMES MUNZ,)

Defendant-Appellant.)

Filed April 20, 1988

7-476
86-1708

Appeal from the Iowa District Court for Lee County (No. CR 1416(N)0786), Joel Kamp, District Associate Judge.

Defendant appeals his convictions of third-degree criminal mischief. **AFFIRMED.**

Charles Harrington Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

Defendant David Munz appeals his conviction of third-degree criminal mischief, following a jury trial, and his conviction of third-degree criminal mischief, after a guilty plea. These appeals have been consolidated in this proceeding. He contends: (1) that he was denied a fair trial in both proceedings by the trial judge's refusal to recuse himself; and (2) that the trial court erred in the jury trial by refusing to strike evidence used by the State in an alleged violation of a pretrial discovery order. We affirm.

On May 19, 1986, Munz was charged with a single count of third-degree criminal mischief (Case No. 1355). On May 27, 1986, Munz filed pretrial motions for discovery and production of evidentiary material. These motions were granted. On July 25, 1986, Munz was again charged with third-degree criminal mischief (Case No. 1416).

The jury trial in Case No. 1355 commenced on September 16, 1986. On Munz's cross-examination the State introduced for impeachment purposes a letter written by Munz. Munz objected to the letter on the grounds its contents were unsubstantiated and its prejudicial effect outweighed its probative value. The trial court admitted the letter. At the close of evidence, Munz moved to strike the letter from the record. The motion was based on the State's failure to disclose the letter to Munz prior to trial in violation of the pretrial discovery order. This motion was overruled. The jury subsequently convicted Munz. Munz moved for a new trial renewing his recusal motion. Attached to the motion were copies of the caption page of the pro se federal suit. This motion was also overruled.

On October 21, 1986, the trial court held a hearing on Munz's motion for recusal in Case No. 1416. Munz contended, as he did in Case No. 1355, that Judge Kamp should have recused himself because of a federal lawsuit filed

by Munz in August naming Judge Kamp as a defendant. Munz also included other charges of bias and prejudice. Judge Kamp refused to recuse himself and Munz entered a guilty plea in Case No. 1416.

Munz's first assignment of error relates to the recusal motions. He argues Judge Kamp abused his discretion in refusing to recuse himself from presiding over his trial, motion for new trial, guilty plea, and sentencing.

In Iowa, a judge is required to recuse himself "in a proceeding in which his impartiality might reasonably be questioned." Iowa Code of Judicial Conduct, Canon 3(c)(1). There is a substantial burden imposed on one who seeks to prove that the trial judge is not impartial. State v. Farni, 325 N.W.2d 107, 110 (Iowa 1982). State v. Smith, 282 N.W.2d 138, 142 (Iowa 1979). The decision of the trial judge will not be overturned unless there has been an abuse of discretion. Farni, 325 N.W.2d at 110; State v. Harry, 311 N.W.2d 108, 109 (Iowa 1981); State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976). In order to constitute the prejudice necessitating a different judge, the alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Farni, 325 N.W.2d at 110; Smith, 282 N.W.2d at 142 (citing United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793 (1966).

Munz contends that in view of the pending lawsuit and the other claims of bias and prejudice, Judge Kamp should have recused himself. The other claims alleged that Judge Kamp offered to make a deal for recusal. An affidavit filed by a prisoner asserted he overheard Munz's attorney report that Judge Kamp would recuse himself if Munz would plead guilty, agree not to file any appeal, postconviction relief petition, or otherwise attack the convictions. Munz also claimed Judge Kamp was biased because of a clash and exchange between himself and the trial court on September 11, 1986. Munz claims he exposed the judge

as working in concert with the prosecutor and other county officials to deny him a fair trial and put him in prison.

The Iowa courts have never addressed this aspect of judicial disqualification. The federal courts which have discussed the issue have held that a judge is not disqualified simply because a party threatens to sue or actually sues. United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986); Ronwin v. State Bar of Arizona, 686 F.2d 692, 701 (9th Cir. 1981); United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1979). If recusal were required in every instance, an easy method for obtaining disqualification would result. This should not be encouraged.

While we have no opinion on the merits of Munz's claims, we conclude Judge Kamp was not required to recuse himself. Although Munz's claims are extrajudicial in nature, he has failed to show the decision reached was affected by his claims since he was convicted by a jury. Munz also has not shown that Judge Kamp's conduct during trial prejudiced him in any way. We therefore hold recusal was unnecessary in this case.

Munz also contends the trial court erred in refusing to strike evidence used by the State in violation of a pretrial discovery order. This claim only pertains to the criminal mischief conviction in Case No. 1355. He argues a letter written by himself should have been excluded because the State failed to disclose it.

During cross-examination, the State elicited from Munz that he had written a letter to the mother of a defense witness. The State had Munz read the following portion of the letter:

> [I]f Nancy were to make a clean and clear, mature, responsible act of responsible nature, i.e. to state that [Carlin] James misconstrued matters, as well as mistook Nancy for me because she was wearing my pants and jacket, that it was she who slashed Dietsch's tires while Hollins and I went up to the apartment to get smokes and wine while she stayed behind to cut tires . . . . The most Nancy would get is probation . . . .

Munz objected because the letter was prejudicial. The trial court then admitted the letter. He now argues that the portion of the letter read into the record should have been stricken.

After Munz admitted writing the letter, he requested a short recess in order to review the letter for the purposes of making an objection. Munz then moved to strike the portion of the letter that had not been specifically read into the record. He did not raise the violation of the discovery order. The next day after the close of evidence Munz moved to strike the letter because of the discovery violation.

We conclude Munz waived any error that may have occurred. A motion to strike must be made "as soon as the grounds therefor are apparent or as soon as is convenient after the objectionable statements are given by the witness." State v. Leto, 305 N.W.2d 482, 490 (Iowa 1981) (Motion to strike inculpatory statement not disclosed made after a short recess and recross-examination untimely); Iowa R. Crim. P. 13(6)(c).

Application of this reasoning points to the conclusion that Munz failed to properly invoke the rule's remedies. The challenged evidence was admitted over Munz's objection; but, after Munz requested a short recess to review the letter for the express purpose of making further objections, he failed to raise the discovery violation and only challenged the unread portion of the letter. Munz's motion to strike made after the close of evidence was untimely. No explanation was offered for the motion's tardiness. Accordingly, we hold Munz has waived any error that may have arisen from the admission of the letter.

The defendant's conviction is affirmed.

AFFIRMED.