[Cite as *State v. Qualls*, 2015-Ohio-2182.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26423
	:	
v.	:	T.C. NO. 14CR2140/1
	:	
WESTON QUALLS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___5th___ day of ____June____, 2015.

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FROELICH, P.J.

{¶ 1} Weston Qualls pled guilty in the Montgomery County Court of Common Pleas to aggravated burglary, a first-degree felony, and he was sentenced to three years in prison. Qualls appeals from his conviction, claiming that the trial court should have provided him a hearing on his oral motion for recusal, which was made at his sentencing

hearing. For the following reasons, the trial court's judgment will be affirmed.

{¶ 2} According to various statements in the record, at approximately 11:30 p.m. on June 16, 2014, Qualls and two co-defendants forced their way into a West Carrollton residence with the intent to fight one of the occupants, Brandon Byrd. One of Qualls's co-defendants was armed with a handgun, and Qualls was aware of that fact. The four occupants of the apartment retreated to upstairs bedrooms and were pursued by the defendants. The three defendants attempted to enter one bedroom by kicking or punching a hole in the door. Byrd heard Qualls threaten that a co-defendant would shoot him (Byrd) through the door if he did not come out. The defendants fled the residence when Byrd yelled that he had called the police.

{¶ 3} In July 2014, Qualls was indicted on one count of aggravated burglary, with a firearm specification. On September 18, 2014, Qualls pled guilty to the aggravated burglary. In exchange for his plea, the firearm specification was dismissed. The parties did not reach an agreement on Qualls's sentence. A presentence investigation was conducted, and Qualls returned to court on October 8, 2014 for sentencing.

{¶ 4} At the beginning of the sentencing hearing, after discussing whether defense counsel had reviewed the presentence investigation report and defense counsel's filing of a sentencing memorandum (which recommended community control), defense counsel asked the trial judge to recuse himself. Counsel stated: "But it's also come to my attention, through discussions with the Court, that the Court sentenced my client's brother some time ago on a fairly high level felony. Based upon that, at this time, we would make a motion for the Court to assign a different judge for sentencing in this matter." The court responded:

> The Court will overrule that motion. I'll speak to the issue. You are correct. I sentenced Mr. Weston Qualls' brother, Wesley Qualls (phonetic throughout), to a prison sentence some time ago. I should note for the record that my sentence, and I'll express this again, with my comments on the sentence, is based entirely on the facts of this particular case. There is nothing about Weston Qualls' relationship with Wesley Qualls that enters into my sentencing decision in this case. So, for the record, I want to put that in its proper place. And I want to say that as a backdrop for denying the motion.

{¶ 5} The trial court sentenced Qualls to three years in prison, the minimum prison term for a first-degree felony. In imposing sentence, the court commented:

> Weston Qualls is 19 years old. It is troubling for me that I'm the same judge who sentenced his older brother Wesley to a prison term, but that is in a completely different case. Nobody, least of all this body, yours truly, likes to send anybody to prison. But part of my obligation to the community, part of the oath that I took as a judge is, in those cases, where I deem, based on the facts of the particular case, a person sentenced [sic] [prison sentence] to be appropriate within the bounds of the law, then I'm obligated to act accordingly. And again, while I'm not happy that I sent anyone to prison, and I'm not happy for the sake of Ms. Qualls, that I sent her older son Wesley to prison. That cannot – my happiness of being in that position cannot bear upon what I have to do in this case based on the particular facts of this case. My sentencing decision here, in no way, is based upon the

earlier sentencing case in the matter of Weston Qualls' brother, Wesley Qualls.

{¶ 6} Qualls appeals from the trial court's judgment. His sole assignment of error states that the trial court "committed prejudicial error by failing to hold a hearing or invite argument on appellant's motion that he recuse himself."

{¶ 7} "The disqualification of a judge is an extraordinary remedy." *In re Disqualification of Capper*, 134 Ohio St.3d 1272, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 26. R.C. 2701.03 sets forth the procedures for seeking disqualification of a common pleas court judge for prejudice. Under that statute, a party or the party's attorney may file an affidavit of disqualification with the clerk of the Supreme Court of Ohio. R.C. 2701.03(A). The affidavit must meet several requirements, as set forth in R.C. 2701.03(B). If a proper affidavit is submitted, the chief justice of the supreme court or his or her designee determines whether the trial judge is biased or prejudiced. R.C. 2701.03(D), (E).

{¶ 8} The procedure set forth in R.C. 2701.03 provides "the exclusive means by which a litigant may claim that a common pleas judge is biased and prejudiced." *Jones v. Billingham*, 105 Ohio App.3d 8, 11, 663 N.E.2d 657 (2d Dist.1995); *see, e.g., State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 62; *State v. Hudson*, 2d Dist. Clark No. 2014 CA 53, 2014-Ohio-5363, ¶ 25; *State v. Galluzzo*, 2d Dist. Champaign No. 2004-CA-25, 2006-Ohio-309, ¶ 15. "A court of appeals does not have authority to rule on the disqualification of the trial judge or to void a judgment of the trial court on that basis." *Easterling v. Hafer*, 2d Dist. Montgomery No. 24950, 2012-Ohio-2101, ¶ 9.

{¶ 9} Qualls asked the trial judge to recuse himself on the ground that the judge

had previously sentenced Qualls's brother to prison; the record reflects that Qualls's attorney became aware of the issue based on discussions with the trial court. The trial court knew that he had previously sentenced Qualls's older brother to a prison sentence, and the trial judge could determine whether his prior involvement with Qualls's brother's case would affect his impartiality. Assuming that we could review the trial judge's decision not to recuse himself, under the circumstances before us, we find no error in the trial court's failure to hold a hearing on the matter.

{¶ 10} Qualls could have sought disqualification of the trial judge under R.C. 2701.03, but did not. The record does not reflect when counsel became aware that the trial court had sentenced Qualls's brother, but if it was shortly before the sentencing hearing, Qualls could have requested a continuance in order to have an opportunity to file an affidavit of disqualification before sentencing. Qualls did not do this either.

{¶ 11} In his appellate brief, Qualls suggests that his trial counsel rendered ineffective assistance by failing to file an affidavit of disqualification. He further notes that the record does not indicate "what arguments might have been made or supported," and that this issue must be raised in a petition for post-conviction relief.

{¶ 12} To reverse a conviction based on ineffective assistance of counsel, an appellant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of

reasonable assistance. *Strickland*, 466 U.S. at 688. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524–525, 605 N.E.2d 70 (1992); *State v. Rucker*, 2d Dist. Montgomery No. 24340, 2012-Ohio-4860, ¶ 58.

{¶ 13} Based on the record before us, we find no basis to conclude that counsel acted unreasonably in failing to file an affidavit of disqualification under R.C. 2701.03. "Judicial bias is 'a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.' Trial judges are 'presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity.'" (Internal citations omitted.) *Weiner v. Kwait*, 2d Dist. Montgomery No. 19289, 2003-Ohio-3409, ¶ 89-90.

{¶ 14} There is nothing in the record to suggest that the trial court was biased against Qualls due to the court's having previously sentenced Qualls's brother or that the court considered, in any way, Qualls's brother's criminal activity in determining Qualls's sentence for aggravated burglary. To the contrary, the trial court emphasized that it was required to consider only the particular facts of Qualls's case in determining the appropriate sentence for Qualls. Absent a showing of actual bias, the mere fact that the trial court was familiar with Qualls's brother and had previously sentenced him to prison did not preclude the trial court from presiding over Qualls's case. *Compare In re*

Disqualification of Aubry, 117 Ohio St.3d 1245, 2006-Ohio-7231, 884 N.E.2d 1095, ¶ 7 ("a judge who presided over prior proceedings involving one or more parties presently before the court is not thereby disqualified from presiding over later proceedings involving the same parties"); *State v. Hall*, 2d Dist. Montgomery No. 25858, 2014-Ohio-416. Furthermore, there is nothing in the record to suggest that Qualls would have received a more lenient sentence had he been sentenced by another judge.

{¶ 15} To the extent that Qualls's claim of ineffective assistance of counsel relies on information outside of the record, we agree with Qualls that the issue is not cognizable on direct appeal.

{¶ 16} Qualls's assignment of error is overruled. The trial court's judgment will be affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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