

When justice sleeps

Those who have trust in the justice system could get a rude awakening from napping judges, attorneys and jurors

BY KATHY CRUZ
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After a long, bitter battle with Keller school officials in Tarrant County over the needs of her autistic, suicidal son, Sheryl Kaminsky hoped that a due process hearing would finally wake them up.

Turns out, she couldn't even wake up the judge.

Larry Craddock, a special education hearing judge in a case brought by Kaminsky and her partner Donna Harvey on behalf of their son Ryan, slept during critical testimony over several days of proceedings in Keller. The judge repeatedly dozed, they said, despite both of them coughing excessively and dropping water bottles and four-inch-thick evidence binders.

"It was disturbing. We didn't know what to do," said advocate Mara LaViola, who has worked closely with the couple and with their attorney, Myrna Silver of Dallas. "These parents had spent so much money to get there and had fought the system, and now he was sleeping during their chance to be heard."

Though initially Craddock denied having nodded off, a cell phone camera left little doubt. He eventually resigned over the

resulting furor, but it was not enough for Kaminsky and Harvey to get a ruling in their favor. Favorable rulings against school districts rarely happen anyway with judges that are hired by the Texas Education Agency to preside over due process hearings, they said.

Adding insult to injury for the Keller couple was the fact that there had been several other complaints about Craddock sleeping on the bench - and yet the TEA continued to allow him to preside in hearings.

Harvey and LaViola said that Kaminsky had a breakdown over the judge's persistent inattentiveness and at one point had to be taken to an emergency room with dangerously high blood pressure.

"It was," said Harvey, "emotionally devastating."

LIVES AT STAKE

As bad as the experience was for Harvey and Kaminsky, imagine being a defendant in a capital murder trial and the judge, jury members - or your own defense attorney - use the courtroom as a place to catch 40 winks.

It's happened.

In 1999, former death row inmate Calvin Jerold Burdine was granted a new trial on the

basis that he had been denied his Sixth Amendment right to counsel because of the persistent slumber of his lawyer during testimony. Burdine's lack of competent representation led in part to the creation in 2000 of the Fair Defense Act, which led to the formation of the Indigent Defense Task Force. The Task Force recently became the Texas Indigent Defense Commission.

Burdine's lawyer, Joe Frank Cannon of Houston, also was found to have slept during the capital murder trial of another of his clients, Carl Johnson. Johnson was not as lucky as Burdine. He was executed in 1996.

According to Kathryn Kase, executive director of Texas Defender Service, 10 clients of the now-deceased Cannon ended up on death row.

Another Houston attorney, John Benn, slept throughout virtually the entire trial of his client, George McFarland, according to Kase and the Houston Chronicle. Nevertheless, the Texas Court of Criminal Appeals denied McFarland a new trial and upheld his death sentence because another defense attorney remained awake. McFarland currently is on death row.

Houston Chronicle court reporter John Makeig, now deceased, stated in a video about McFarland's trial that he confronted the judge about Benn's repeated slumber, telling him that it "shouldn't be going on" and that "everybody in the world deserves better representation than that."

According to Makeig, the judge replied that the Constitution guarantees everyone an attorney, "but there ain't nothing in the Constitution about the attorney having to be awake."

WAKE-UP CALL

Brian Stull, senior staff attorney for the American Civil Liberties Union's Capital Defense Project, said that a sleeping judge is "completely unacceptable."

He said that in Burdine's case, the 5th Circuit Court of Appeals determined that "unconscious counsel is the same as no counsel at all." Stull said he believes the same rule of thumb applies to judges.

"The judge's role is like the umpire's role in a ball game - he calls the balls and strikes," Stull said. "A trial judge is even more

crucial because the evidence is coming in before the trial judge, and they have to be constantly making decisions."

But Robert Sherwin, an adjunct professor with Texas Tech University School of Law in Lubbock, doesn't completely agree. He said that there are safeguards to minimize any damage done in the rare cases when a judge dozes on the bench.

"You could say a judge is like a referee in a football game, but even that might be overstating it," he said.

Sherwin said that sleeping judges may not actually get anything wrong and, if they do realize later that they have erred, they can correct it. Also, he said, the Court of Appeals can reverse a verdict that resulted from an incorrect ruling.

THEY SNOOZE, WE LOSE

In June of 2009, a state appellate court in Ohio tossed a murder conviction because at least two jurors slept and the judge did nothing to stop it. The decision granting Arif Majid a new trial stated that sleeping "is a form of juror misconduct."

Further, the judge - who had been informed five times during the trial that a juror had been dozing - said: "I saw it. So what. Let him sleep. You guys picked the jury. I didn't."

Stull, of the ACLU, said that a sleeping juror is similar in many ways to a sleeping judge.

"The judge calls the balls and the strikes on the legal issues, but the jurors determine the facts," he said. "They are there for very similar reasons; it's just a division of responsibilities. The defendant has an absolute right to a trial by a jury. If you're missing one of them at any time, that right is being violated."

RIGHTS AND WRONGS

Harvey said that she and Kaminsky asked Craddock to recuse himself because of his repeated dozing, but "at first he refused because he said that the rules state that any requests for recusals have to be made 10 days prior to the hearing. We said, 'We had no way of knowing that you were going to sleep during the hearing.'

"It's like there's no accountability," Harvey said, "for those who are put in those positions of power."

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TRIAL: Family member's notes detail judge sleeping during capital murder trial

FROM PAGE ONE

room was full of reporters busily scribbling away.

For a while, Sandy thought someone would surely ask for her notes, but no one ever did - even when the court reporter messed up the transcript so badly that she lost her license.

Through the years, Sandy held onto her notebooks anyway, convinced God had told her that someday a reporter would call asking for them.

Then, out of the blue, one did.

THE JUDGE RESTS

When serious problems arose with court reporter Sandra Halsey, no one turned to Sandy for help in reconstructing the trial transcript. She, after all, was not an official court reporter.

Her notes could not be mistaken for a professional record of the proceedings that took place in the Kerr County Courthouse those weeks in early '97. They're handwritten, and are sometimes interrupted with pleas for God's help. There are notations that have nothing to do with witness testimony, like this one on page 156: "Serious sleeping from judge."

State District Judge Mark Tolle, according to Sandy's notes, appeared to fall asleep 16 times as Darlie Routier was

on trial for her life.

Brian Stull, senior staff attorney for the American Civil Liberties Union's (ACLU) Capital Punishment Project, says that judges play a "crucial" role in trial proceedings because they have to "constantly be making decisions" as evidence is presented in court.

"There wouldn't be a baseball game without an umpire, so how can anyone agree with a death sentence in a trial where, effectively, you have no judge?" he said. "You have all these constitutional rights and all these statutory rights - and the judge cannot guarantee that the trial goes fairly if the judge is asleep."

Combined with the problems with the court reporter's trial transcript, there might be reason to question the validity of Routier's trial, he said.

Stull said that the transcript problems combined with the alleged sleeping of the judge "is a really bad combination."

Of Sandy's notes, he said: "One of the things that concern me about this case is that the notes seem to reflect that this is happening repeatedly throughout the trial. Each time it happens, it just increases the concern and makes it less likely that she (Sandy) was mistaken. The more it happened, the more



TEST OF FAITH: Darlie Routier entrusted "Aunt Sandy" - Sandy Aitken of Springtown - with her Bible when she was arrested on a capital murder charge in June of 1996. Aitken said that during the time her nephew's wife was in jail awaiting trial, she provided spiritual counsel to the young mother.

I think anyone would be concerned."

Tolle died in 2007.

On some of Sandy's notations about the judge sleeping, she wrote the time at which he appeared to nod off. On page 105, it was at 4:45 p.m.; on page 108, it was 9:15 a.m.; on page 111, it was 9:40 a.m., on page 121, it was 2 p.m. and on page 155, it was 1:35 p.m.. On page 48, she wrote this: "Judge is sleeping again. What a job."

There were two such notations on page 138, written as Rowlett Police Lt. James Walling was testifying about his han-

dling of bloody crime scene evidence, some of which he said he put in his car.

One of issues that Darlie and her family have with the Rowlett Police Department's investigation was the way officers handled the blood evidence. They claim that officers mishandled evidence by not placing bloody articles of clothing and other material in separate bags.

In the midst of Walling's testimony on that very topic, Sandy wrote this: "Judge seriously sleeping."

She underlined the words twice.

DREAMS OF JUSTICE

Sandy and the reporters were not the only ones scribbling away in the courtroom at the Kerr County courthouse. At the defense table, Darlie was, too. During breaks, members of the defense team would slip Sandy the letters Darlie wrote to her as witness after witness pushed her ever closer to the execution chamber.

"I will never turn from God," was how she ended one letter, in girlish, looped cursive.

Robert Aitken said that what happened to Darlie "affects the whole family."

"For years, every time I would pass a cop, I would start to shake," he said. "I would think, 'If he pulls me over, am I going to jail?'"

Among the memories of Darlie that are strewn on the kitchen table at Aunt Sandy's and Uncle Robert's house is a big blue Bible. It has the name "Darlie Routier" engraved in the lower right corner. Darlie, Sandy said, gave it to her to keep until she can someday reclaim it.

In an interview from death row two months before Aunt Sandy removed her trial notes from the kitchen hutch, Darlie spoke of the judgments that were levied against her when her life hung in the balance.

"At the time, I was called materialistic. I dyed my hair blond. I liked to shop. I had a boob job. I'm like, OK, if that is the criteria for a murderer, then 90 percent of the women in Dallas would be [killers]. It really hurt, because I felt like I had to really defend myself for those things."

"I was 20-something years old. Of course I liked to wear nice clothes and do my hair, but that stuff didn't matter to me. Anybody that was around me will tell you the same thing."

"Darin and I, before we ever started making money, we were practically poor. We lived in a little apartment, no furniture hardly, just barely making it. But we were so happy. We were so happy."

The autumn light is a golden hue as the visitor heads back toward the entrance to the time portal. A dog lopes up a long driveway. A woman in a shirt the color of pumpkins maneuvers a riding lawn mower.

The plucky rooster is again where it doesn't belong. Its head thrusts forward and back, trusting that sheer perseverance will help it traverse perilous terrain, arriving safely on the other side.

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