

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

No. 3932-16

v.

WILLIAM H. COSBY, JR.

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MEMORANDUM OPINION AND ORDER SUR RECUSAL

O'NEILL, J.

September 19, 2018

On September 11, 2018, the Defendant filed a “Motion for Disclosure, Recusal and for Reconsideration of Recusal (“Motion”) and supporting Memorandum of Law. The Commonwealth filed a “Response to the Motion for Disclosure, Recusal, and For Reconsideration of Recusal,” (“Response”), on September 13, 2018.

In his Motion, the Defendant asks the Court to: 1) make a disclosure related to a witness; 2) vacate the February 4, 2016 Order denying his Petition for a Writ of Habeas Corpus,¹ and recuse itself from further proceedings; and 3) reconsider the denial of his prior recusal motion.²

“A motion for disqualification is directed to and decided by the jurist whose impartiality is questioned.” League of Women Voters of Pennsylvania v.

Commonwealth, 179 A.3d 1080 (Pa. 2018) (citing Commonwealth v. Travaglia, 661 A2.d 352, 370 (Pa. 1995)).

¹ On January 11, 2016, the Defendant filed a “Petition for a Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney’s Office,” (“Petition”) and supporting Memorandum of Law, seeking, *inter alia*, to have the charges dismissed on the basis of a non-prosecution agreement. A hearing on this issue was held on February 2 and 3, 2016.

² “Defendant’s Motion for Recusal of The Honorable Steven T. O’Neill and Request for Reassignment” was filed on March 21, 2018 and denied March 29, 2018.

It is well settled that,

[t]here is a presumption that judges of this Commonwealth are honorable, fair and competent, and, when confronted with a recusal demand, are able to determine whether they can rule in an impartial manner, free of personal bias or interest in the outcome. If the judge determines he or she can be impartial, the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. A judge's decision to deny a recusal motion will not be disturbed absent an abuse of discretion.

Lomas v. Kravitz, 130 A.3d 107, 122 (Pa. Super. 2015), aff'd, 170 A.3d 380 (Pa. 2017) (citations and internal quotations omitted).

Furthermore, courts have consistently held that, “[i]n this Commonwealth, a party must seek recusal of a jurist at the earliest possible moment, *i.e.*, when the party knows of the facts that form the basis for a motion to recuse. If the party fails to present a motion to recuse at that time, then the party's recusal issue is time-barred and waived.” Lomas v. Kravitz, 170 A.3d 380, 390 (Pa. 2017). “Notably, [the Pennsylvania Supreme Court] has held that, in addition to actual knowledge of the facts underlying the application, facts that ‘should have been known’ are to be considered in determining timeliness.” League of Women Voters, 179 A.3d at 1087 (citation omitted). Courts conduct a waiver analysis because,

[l]itigants cannot be permitted to hedge against the possibility of losing a case on the merits by delaying the production of arguable grounds for disqualification, or, worse, by digging up such grounds only after learning of an adverse order. To hold otherwise would encourage judge-shopping, would undermine the interests in the finality of judicial decisions, and would countenance extensive and unnecessary expenditures of judicial resources, which are avoidable by mere timely advancement of the challenge. The courts of this Commonwealth cannot and do not approve of such gamesmanship.

Id. at 1086; Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 489 A.2d 1291, 1300 (Pa. 1985) (citation omitted) (stating, “[o]nce the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain following an unfavorable result”). Where a recusal motion is based upon purportedly after-discovered evidence, the Pennsylvania Supreme Court has held that, “as in other cases involving after discovered evidence, there must be a showing that... the evidence could not have been brought to the attention of the ... court in the exercise of due diligence.” League of Women Voters, 179 A.3d at 1087 (quoting Reilly, 489 A.2d at 1301). Defendant’s post-verdict,³ presentence Motion is both time-barred and meritless.

First, the Motion is untimely and, thus, waived. This case commenced with the filing of a Criminal Complaint on December 30, 2015. Numerous pretrial hearings were held, beginning with the first hearings on February 2 and 3, 2016. The Defendant was represented by a total of 7 attorneys at various times, through the commencement of jury selection on May 22, 2017. The first trial ended in a mistrial on June 17, 2017. Thereafter, Defendant replaced his entire Defense team with 8 new lawyers who represented Defendant at various times through commencement of the

³ The Rules of Criminal Procedure provide for an oral Motion for Extraordinary Relief prior to sentencing seeking an arrest of judgment, judgment of acquittal, or a new trial. Pa. R. Crim. P. 704 (B). The Motion does not comport with that rule and is, therefore, procedurally improper as well. Appellate courts have repeatedly stated “this Rule was not intended to provide a substitute vehicle for convicted defendant to raise matters which could otherwise be raised via post sentence motions.” Commonwealth v. Howe, 842 A.2d 436, 441, (Pa. Super. 2004) (citations omitted). The Defendant seeks to revisit a pretrial ruling, under the guise of a motion to recuse; he may challenge that ruling via the appropriate post-sentence procedures.

second trial, and vigorously pursued many additional pre-trial motions on Defendant's behalf. As noted above, the Defendant filed a recusal motion on March 21, 2018, which was denied following a hearing on March 29, 2018.

The second trial commenced with jury selection on April 2, 2018. On April 26, 2018, the jury found the Defendant guilty of three counts of Aggravated Indecent Assault (18 Pa. C.S.A. § 3125). By Order of May 15, 2018, this Court set sentencing for September 24 and 25, 2018. Defendant's current counsel entered his appearance on June 14, 2018 and did not file the within Motion until September 11, 2018.

The sum and substance of the Motion is based on a March 28, 2018, unsourced tabloid article posted by "Radar Online," a website described by the Defendant as an "internet gossip site." (Motion ¶ 7). The article was posted the day before this Court held a hearing on the Defendant's prior recusal motion, and four days before the start of his second trial. The Defendant's spokesperson is quoted in the article. (Motion, Exhibit "A" at 4). As noted in the Commonwealth's Response, the Defendant's spokesperson accompanied the Defendant to every court appearance, observed the proceedings, and frequently spoke on the Defendant's behalf to the media. (Response at 5). Clearly, the Defendant was aware, or should have been aware, of the basis for the instant motion in March of 2018 at the latest, *prior to the commencement of his retrial*. Furthermore, the fact that this Court sought a party nomination for the Office of District Attorney nearly twenty years ago is a fact of public record that could easily be uncovered in the exercise of due diligence by no less than 15 attorneys (and their private investigators) acting in the capacity of Defendant's legal counsel. Therefore, the Motion is untimely as a matter of Pennsylvania law.

Even assuming, *arguendo*, the Court had a duty to disclose that a witness was a political opponent nearly twenty years ago, basing the Motion on the Court's duty to disclose does not overcome the failure to file the Motion at the earliest possible date. See League of Women Voters, 179 A.3d at 1088 (quoting Reilly, 489 A.2d at 1301) (“[S]imply because a judge does not raise *sua sponte* the issue of his impartiality, however, does not entitle a party to question a judge's partiality after the case has ended without substantiation in the record that the complaining party did not receive a full, fair, and impartial trial”).

Even if this unsubstantiated claim, raised on the eve of sentencing, is not waived, it is facially meritless. Accordingly, a hearing is neither required nor necessary. (See Pa. R. Crim. P. 577 and 704). “The party who asserts that a trial judge must be disqualified must produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.” Lomas v. Kravitz, 130 A.3d 107, 122 (Pa. Super. 2015), aff'd, 170 A.3d 380 (Pa. 2017) (citations and internal quotations omitted). The Motion and supporting memorandum of law do nothing more than assert that this Court *should* have a bias, based on the campaign tactics of a witness twenty years ago, that somehow precluded the Court from making credibility determinations at a hearing in this case 31 months ago. This claim is wholly without merit.

The undersigned has served on the Montgomery County Court of Common Pleas since July, 2002. For the first six years of this Court's tenure, 2002-2008, Mr. Castor served as the District Attorney of Montgomery County. Not once during his tenure as District Attorney was Mr. Castor, or anyone else, heard to ascribe some sort of

“grudge” or prejudice against Mr. Castor in any criminal matter that came before this Court. Likewise, since 2009, Mr. Castor has, on occasion, appeared before this Court as a criminal defense attorney and has never sought disclosure or disqualification of the Court because of some perceived bias or “grudge” against him. No “grudge,” animus, bias or prejudice can be claimed because it simply does not exist.

Defense counsel’s conclusory statement that any credibility determinations made by the Court as to [all] witnesses who testified “was an express finding that the testimony of the former District Attorney, Mr. Castor, was not credible” is simply false, with no basis in fact. (Motion ¶ 5). The Court carefully weighed the testimony of each of the witnesses⁴ at the February 2 and 3, 2016 hearing on the Petition for a Writ of Habeas Corpus, and applied the applicable law, in denying the portion of the Petition seeking dismissal of the charges. This Court’s ruling on the Petition, as stated on the record and memorialized in the order of February 4, 2016, and its subsequent “Findings of Fact, Conclusions of Law and Order Sur: Defendant’s Motion to Suppress⁵ Evidence Pursuant to Pa. R. Crim. P. 581 (I),” docketed December 5, 2016, were not based solely on the Court’s credibility assessment of any individual witness, but rather

⁴ In addition to Mr. Castor, John P. Schmitt, Esq, testified on behalf of the Defendant. Dolores Troiani, Esq., and Bebe Kivitz, Esq., were called by the Commonwealth.

⁵ Defendant’s “Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney’s Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination” was filed on August 12, 2016. A hearing was held on November 1, 2016. No new evidence was presented at the hearing. Rather, the Notes of Testimony from the February 2 and 3, 2016 hearing on the Defendant’s “Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney’s Office,” and a series of stipulations were admitted as evidence sufficient to dispose of the Motion to Suppress.

on the testimony of all witnesses and ultimately rested on the legal insufficiency of the evidence presented by the defendant in support of his motions.

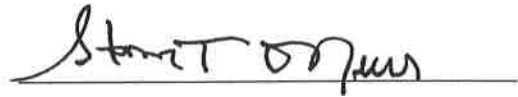
In regards to Section III of the Motion, seeking a reconsideration of this Court's ruling on the Defendant's prior Motion to Recuse filed March 21, 2018, and denied March 29, 2018, the Court's findings, statements and reasons for said denial which were placed on the record on March 29, 2018 are incorporated herein by reference. Nothing raised by the Defendant warrants reconsideration of the Court's previous denial.

Finally, even though this Court believes the claim to be waived, the Court nevertheless undertook conscientious reflection on claims raised in the Motion. Throughout the pendency of this matter, and in every matter over which this Court presides, this Court is sensitive to its obligations under the Code of Judicial Conduct, and takes these obligations very seriously. This Court is confident that it has and can continue to assess this case in an impartial manner, free of personal bias or interest in the outcome. This Court simply has no bias against any witness called by the defense or the Defendant himself. This Court finds no merit in any of the bases alleged by the Defendant and the Court will not recuse itself. Based on the foregoing, the Court issues the following:

ORDER

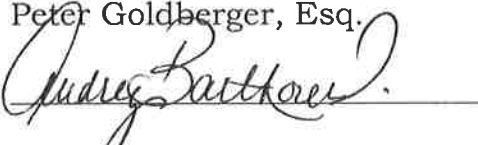
And now this 19th day of September, 2018, upon consideration of the Defendant's Motion for Disclosure, Recusal and For Reconsideration of Recusal, and supporting Memorandum of Law, filed September 11, 2018, and the Commonwealth's Response thereto, filed September 13, 2018, it is hereby **ORDERED** and **DECREED** that the Motion is **DENIED** in its entirety.

BY THE COURT:



STEVEN T. O'NEILL, J.

Copies of this Order mailed on 9/19/18 to the following:
Joseph P. Green, Esq.
Kevin R. Steele, Esq.
Peter Goldberger, Esq.


Secretary