

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 0935-1991
	:	CRIMINAL DIVISION
JERARD BRADLEY,	:	APPEAL
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

The Defendant appeals the Order of the Honorable Nancy L. Butts dated April 7, 2010, which denied the Defendant's Motion for Specific Performance of Plea Agreement. On April 19, 2010, the Defendant filed a Petition for Reconsideration of this Court's Order denying the Defendant's Motion for Specific Performance of Plea Agreement. In his Petition for Reconsideration, the Defendant requested that Judge Butts vacate the Order of April 7, 2010, and recuse herself from his case as Judge Butts was an Assistant District Attorney initially involved in this case in 1991. The Defendant filed a Notice of Appeal on May 10, 2010, and on May 21, 2010, the Honorable Dudley N. Anderson directed the Defendant, in accordance with Pa.R.A.P. No. 1925(b), to file within thirty days a Concise Statement of Matters Complained of on Appeal to the Office of Judge Butts. This Court received the Defendant's Concise Statement of Matters Complained of on Appeal on June 4, 2010.

The Defendant raises three issues on appeal: (1) the lower court Judge abused her discretion by failing to recuse herself for conflict of interest in that the lower court Judge was an Assistant District Attorney who approved the Defendant's plea agreement which is at issue before said Court: (2) the lower court erred by denying relief because no legal authority exists to

grant “Specific Performance Relief”: (3) Judge Dudley N. Anderson did not have the authority to order the Defendant to file a 1925 statement when he was not the assigned judge of record.

Discussion

The lower court Judge abused her discretion by failing to recuse herself for conflict of interest in that the lower court Judge was an Assistant District Attorney who approved the Defendant’s plea agreement which is at issue before said Court

The Defendant contends in his Statement of Matters Complained of on Appeal that Judge Butts abused her discretion by failing to recuse herself for conflict of interest as she served as an Assistant District Attorney initially involved in the Defendant’s case in 1991. Pa. Code of Judicial Conduct Canon 3(C)(b) provides:

C. Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(b) they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

The Court notes that Pa. Code of Judicial Conduct Canon 3(C)(b) states that judges **should** disqualify themselves in certain situations, not that judges **shall** disqualify themselves.

Failure to include the term **shall** shows that Pa. Code of Judicial Conduct Canon 3(C)(b) is not mandatory. The court in Commonwealth v. Darush, 459 A.2d 727 (1983) notes that

“The party who asserts that a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal.” See

Commonwealth v. Perry, 364 A.2d 312 (1976). Furthermore, the Darush Court stated that the decision of a judge as to whether or not to recuse himself will be not disturbed absent an

abuse of discretion. See Commonwealth v. Kane, 184 A.2d 405, 406 (1962). The Darush Court found that a judge who previously participated in the prosecution against a defendant was, absent a showing of prejudgment or bias, was “not in error in failing to recuse himself solely on the basis of his prior prosecutorial role.” Although the issue in Darush concerned an instance where the judge previously prosecuted the defendant on an unrelated case, the Court believes that the decision of the Darush Court on this issue is applicable in the present case. The Defendant does not provide any showing of prejudgment or bias on the part of this Court. The Defendant merely states in his Petition for Reconsideration that as Judge Butts was an Assistant District Attorney in this case in 1991, this Court has a conflict of interest and the Judge should recuse herself. Furthermore, the April 7, 2010, Order from which the Defendant is appealing is not discretionary in nature. The Order merely states the fact that there is no legal authority for the consideration of the Defendant’s requested relief. As the Defendant failed to provide any showing of prejudgment or bias on the part of this Court, the Court was not in error for failing to recusal itself from this case.

The lower court erred by denying relief because no legal authority exists to grant “Specific Performance Relief”

For purposes of this issue, the Court will rely on its Order of April 7, 2010.

Judge Dudley N. Anderson did not have the authority to order the Defendant to file a 1925 statement when he was not the assigned judge of record

The Defendant contends that Judge Anderson did not have the authority to order the Defendant to file a 1925 statement when he was not the assigned judge of record. This argument lacks legal merit. Regardless of whether he was the assigned judge of record, Judge Anderson was justified in ordering the Defendant to file a 1925 statement. In fact, once Judge Butts

recalled that she served as an Assistant District Attorney in this case in 1991, she transferred the case to Judge Anderson in order to avoid any conflict of interest. As Judge Anderson did have legal authority to order the Defendant to file a 1925 statement, he was not in error for doing so.

Conclusion

As all of the Defendant's contentions lack merit, it is respectfully suggested that the decisions of this Court and of the Honorable Dudley N. Anderson be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
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