

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA,

Plaintiff,
vs.

MATTHEW NIHART,

Defendant.

: NO. 18-20633

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: FAMILY COURT
: ACTION

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: *Motion for Recusal*

OPINION AND ORDER

On November 1, 2018, Defendant filed his *Motion to Recuse* (hereinafter “Defendant’s Motion”), requesting that the Court recuse itself from a Protection from Abuse hearing that is presently scheduled for November 30, 2018. On November 13, 2018, a hearing was held in this matter following which Defendant’s Motion was denied. This opinion is offered in support of that order.¹ In Defendant’s Motion, he avers that he “had 4 criminal cases that [the Court] prosecuted.”² In the following paragraph, Defendant states that the Court “was a direct part of prosecuting the Defendant’s prior criminal cases, therefore, there is the appearance of bias, prejudice, and unfairness in the Judge’s participation” in the present case.³

At the November 13th hearing, Defense counsel noted that the Court was not personally involved in any of these criminal cases—the Court was simply the district attorney when these cases were proceeding through the criminal justice system. Defense counsel also noted that she had no evidence to present to the Court to

¹ Defendant was not present for the hearing. Defendant’s counsel indicated that her office had failed to give Defendant notice of the hearing, but the parties had no objection to proceeding in Defendant’s absence.

² Defendant’s Motion to Recuse, ¶4.

establish actual prejudice, and that the motion is based only on the appearance of prejudice. Since the Court possessed no recollection of the four criminal case docket numbers that Defendant cited in his motion, the Court requested that Defense counsel discuss the backgrounds and outcomes of these four cases. The first occurred in 2010, the second in 2014, the third in 2014, and the fourth in 2015. The Court was not personally involved in any of these cases.

Code of Judicial Conduct Rule 2.2 states, a “judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”⁴ Regarding recusal, Rule 2.11 states:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. [. . .]

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy[. . .].⁵

In *Commonwealth v. Darush*, the Pennsylvania Supreme Court addressed a recusal related to a former district attorney.⁶ The Court in *Darush* found that service as former district attorney alone is insufficient to warrant recusal absent “facts showing the trial

³ *Id.*, ¶15.

⁴ Pa. Code of Judicial Conduct Rule 2.2.

⁵ Pa. Code of Judicial Conduct Rule 2.11(A)(1), (6).

⁶ See generally *Commonwealth v. Darush*, 459 A.2d 727 (Pa. 1983).

judge had any actual knowledge of, or participation in, the investigation of the offense.”⁷

The Court also found insufficient the fact that the trial judge, when district attorney, had taken a witness statement in an unrelated case which mentioned the appellant.⁸

Appellant’s third argument for recusal was that the trial judge had prosecuted appellant on unrelated charges while the district attorney.⁹ The Supreme Court still refused to require recusal of the trial judge, stating:

Our Court has held the appearance of judicial integrity and impartiality requires a judge who had represented a party to remove himself from further participation in the case. Indeed, the Code of Judicial Conduct requires no less.

However, we have never held and are unwilling to adopt a *per se* rule that a judge who had participated in the prosecution of a defendant may never preside as judge in future unrelated cases involving that defendant. Absent some showing of prejudgment or bias we will not assume a trial court would not be able to provide a defendant a fair trial based solely on prior prosecutorial participation. The record reveals no prejudgment or bias, but rather an evenhanded treatment of both sides. Therefore, based on the record before us, we believe the trial judge was not in error in failing to recuse himself solely on the basis of his prior prosecutorial role.¹⁰

The Court ultimately decided that recusal as to sentencing was warranted because the trial judge refused to “affirmatively admit or deny” making derogatory remarks regarding the defendant to a third party.¹¹ The Supreme Court found that such an “inability” for a definite statement created the appearance of partiality.¹²

The Pennsylvania Superior Court has subsequently affirmed that *Darush* supports recusal when evidence establishes that an appearance of prejudice is

⁷ *Id.* at 731. Importantly, the movant bears the burden of production. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 731-32.

¹¹ *Id.* at 732. The trial judge had stated that he “did not recollect” making the alleged remarks. *Id.*

¹² *Id.*

present.¹³ In the present case, not only has Defendant failed to provide evidence of actual prejudice, but he has also failed to provide evidence of the appearance of prejudice that would warrant recusal. *Darush* is clear—serving as a former district attorney alone is insufficient to warrant recusal. Therefore, Defendant’s Motion is **DENIED**.

IT IS SO ORDERED this 16th day of November 2018.

BY THE COURT,

Eric R. Linhardt, Judge

cc: Ken Osokow, Esq. (Plaintiff’s counsel)
William Miele, Esq. (Defendant’s counsel)
Gary Weber, Esq. (Lycoming Reporter)

¹³ See *Commonwealth v. Druce*, 796 A.2d 321, 329 (Pa. Super. Ct. 2002), *aff’d*, 848 A.2d 104 (Pa. 2004) (“It is clear from *Darush* and *Bryant* that recusal/disqualification is proper where there is evidence of bias or prejudice, as well as where there is evidence tending to show an appearance of bias or prejudice.”).