

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA,

vs.

TRAMANE MOORE,

Defendant.

: NO. 396 - 2018

:

:

: CRIMINAL ACTION

:

:

:

: *Motion for Recusal*

OPINION & ORDER

Before the Court is Defendant Tramane Moore's ("Defendant") *Motion to Recuse* (the "Motion"), which requests the recusal of this Court prior to sentencing. Defendant was found guilty of Receiving Stolen Property and Theft by Deception following a jury trial on March 21, 2019. Sentencing was originally scheduled for May 3, 2019; however, on May 2, 2019, Defendant requested a continuance of sentencing so a PSI report supplement, "Social History Assessment," could be prepared and filed with the Court. The Court granted Defendant's request and sentencing was scheduled for May 22, 2019. On May 17, 2019, Defendant filed the instant Motion and sentencing was continued. On May 22, 2019, the Court heard argument regarding Defendant's Motion and reserved decision. Based on Defendant's request for a briefing schedule, Defendant was given until June 5th to file a brief in support and the Commonwealth was given until June 19th to reply to Defendant's brief. As both briefs have been submitted, Defendant's Motion is now ripe for adjudication.

DISCUSSION

The crux of Defendant's Motion is that the Court should recuse itself based on an appearance of bias. In his Motion, Defendant relies on the fact that the Court "directly"¹

¹ At oral argument, Defendant corrected the record and noted that the Court was not directly involved in

prosecuted him in eleven cases from 2009 to 2017 while the Court served as Lycoming County District Attorney (“District Attorney”), and the Court was the prosecuting attorney of record as District Attorney in a 2012 murder trial where Defendant served as a defense witness.² Defendant also argues that the similarity of some of his cases between 2009 to 2017, which also concerned retail thefts, to his current disposition would result in this Court’s impartiality being “reasonably questioned.”³ Defendant further argued, for the first time at oral argument, that the following statements made by the Court on March 21, 2019 also support a recusal order: (1) the Court’s direction to Defendant during his testimony on the witness stand at trial that he may not use profane language during testimony, even if quoting another person, and (2) the Court’s statement to counsel in chambers when discussing the appropriate jury instructions to the effect of “When juries are confused, they vote to acquit.”⁴

A. Defendant Waived His Recusal Right

Preliminarily, this Court must address whether Defendant’s recusal request was timely. The Pennsylvania Superior Court recently reiterated that a “ ‘recusal request must be timely made’ ” at the “earliest possible moment.”⁵ This means that the defendant must file a motion to recuse “when the party knows of the facts that form the basis for a motion to recuse” or the party’s recusal request has been waived.⁶ The

these prosecutions, but was simply serving the general supervisory role of the Lycoming County District Attorney.

² Defendant’s Motion to Recuse, ¶¶5-6, 10 (May 17, 2019) [hereinafter “Defendant’s Motion”].

³ Defendant’s Motion, ¶9 (citing *Com. v. Knighton*, 415 A.2d 9, 21 (Pa. 1980)).

⁴ While Defense counsel also did not recall the exact words the Court used, she noted at argument that the Court’s statement was along-the-lines of “confusion tends to get acquittals.”

⁵ *Com. v. Blount*, 207 A.3d 925, 930-31 (Pa. Super. Ct. 2019) (quoting *Lomas v. Kravitz*, 170 A.3d 380 (Pa. 2017)).

⁶ *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017).

Defendant's eleven prior cases and appearance as a defense witness were facts known to him prior to the commencement of trial, but were not raised prior to the filing of the Motion on May 17, 2019. Further, after the Court's statements on March 21st, the additional facts underlying Defendant's Motion were known, or should have been known, by him.⁷ Yet, Defendant did not raise issue with these statements until his May 22nd argument. Alternatively, even if the Court were to retroactively include Defendant's concern over the Court's statements in his written Motion, the Motion was still filed nearly two months after the statements were spoken. Therefore, Defendant has failed to seek recusal in a timely manner and the issue is waived.⁸

B. Appearance of Impartiality

Assuming *arguendo* that Defendant raised this issue in a timely manner, recusal is still not warranted.⁹ Regarding recusal requests for sentencing, the Pennsylvania Superior Court has stated:

In the context of criminal sentencing, this standard requires that a judge recuse herself not only when she doubts her own ability to preside impartially, but whenever she believes her impartiality can be reasonably questioned. Consequently, "a party arguing for recusal need not prove that the judge's rulings actually prejudiced him; *it is enough to prove that*

⁷ *Id.* at 391 (the date of knowledge begins to run after the last fact is known or should be known by the movant) (citing *Goodheart v. Casey*, 565 A.2d 757, 764 (Pa. 1989)).

⁸ Defendant first raised the issue of recusal in his letter to this Court on March 25, 2019 wherein he requested the Court's recusal and noted that he wished to proceed *pro se*. The Court forwarded the letter to the Lycoming County District Attorney's Office and Lycoming County Public Defender's Office, and indicated to Defendant that he was disallowed from submitting *pro se* filings while he was represented by counsel. (citing *Hall v. Dorsey*, 534 F. Supp. 507, 509 (E.D. Pa. 1982); Pa.R.Crim.P. Rule 120(B); *Jester v. Pennsylvania Bd. of Prob. & Parole*, 595 A.2d 748, 751 (Pa. Commw. Ct. 1991)). In the Court's response, it also noted: "If the proper procedure is followed regarding Defendant's desire to proceed *pro se*, then a hearing shall be held to determine whether Defendant's waiver of counsel is 'knowing, intelligent, and voluntary.'" (citing *See Com. v. Grazier*, 713 A.2d 81, 82 (Pa. 1998)). Because Defendant was still represented when he mailed his March 25th letter, his letter did not represent a valid recusal request.

⁹ While the Court is cognizant that the following discussion is "pure *dicta*," the issue of recusal is likely to be raised in a subsequent case before this Court. *Lomas*, 170 A.3d at 391 n.13.

the reasonable observer might question the judge's impartiality.” “[A] party's call for recusal need not be based only upon discreet incidents, but may also assert the cumulative effect of a judge's remarks and conduct even though no single act creates an appearance of bias or impropriety.”¹⁰

Concomitantly, the Superior Court has also opined that the insignia of judicial office bears a presumption that the jurist is “ ‘honorably, fair and competent,’ ” and can impartially decide whether he or she is sufficiently dispassionate to preside over the matter.¹¹

In *Commonwealth v. Nihart*, this Court recently addressed a recusal request based on this Court serving as District Attorney when the defendant was prosecuted on four criminal cases that occurred between 2010 and 2015.¹² Similar to the present case,¹³ the Court was not directly involved in prosecuting the defendant in *Nihart* between 2010 and 2015.¹⁴ This Court held in *Nihart* that mere service as District Attorney when the District Attorney's office prosecutes crimes against the same defendant is insufficient to evoke an appearance of bias.¹⁵

Based on *Nihart*, Defendant's argument in the present case that the Court's mere service as District Attorney creates an appearance of bias is unpersuasive. In addition, Defendant has failed to show how the similarity of Defendant's prior cases—in that retail theft is involved—is germane to the Court's present inquiry.¹⁶ Since this Court served in

¹⁰ *Com. v. Bernal*, 200 A.3d 995, 999 (Pa. Super. Ct. 2018) (internal citations omitted).

¹¹ *Id.* (quoting *Com. v. White*, 734 A.2d 374, 384 (Pa. 1999)) (emphasis added); accord *Com. v. Brown*, 141 A.3d 491, 498 (Pa. Super. Ct. 2016) (quoting *Com. v. Melvin*, 103 A.3d 1, 23 (Pa. Super. Ct. 2014)).

¹² *Com. v. Nihart*, No. 18-20633, Opinion & Order: Motion for Recusal (Lyco. Com. Pl. Nov. 16, 2018).

¹³ See *supra* note 1.

¹⁴ *Nihart*, No. 18-20633, at 2.

¹⁵ *Id.* at 3-4 (citing *Com. v. Darush*, 459 A.2d 727, 731 (Pa. 1983)).

¹⁶ Defendant cites *Commonwealth v. Knighton* for this proposition; yet, the Court is unsure of *Knighton's* relevance. In *Knighton*, the Pennsylvania Supreme Court found that the trial court judge should have recused himself based on statements made by the judge on the record that indicated deep personal animus toward the defendant. See *Com. v. Knighton*, 415 A.2d 9, 21 (Pa. 1980). The judge's animus,

only a supervisory role over those prior cases, such supervision is insufficient to prove an appearance of bias regardless of the cases' subject matter. That is, if the Court's lack of personal knowledge of those cases is not disqualifying, then the similarity of those cases is irrelevant. The Court is also unpersuaded by Defendant's claim that an appearance of partiality is present based on his service as a defense witness in a 2012 murder case that this Court personally prosecuted as District Attorney. Based on *Darush*, even if the Court had personally prosecuted *Defendant* in an unrelated case, Defendant would still need to show "prejudgment" on behalf of the Court.¹⁷ Even if this Court were inclined to extend the tenets of *Darush* to defense witnesses, Defendant has failed to proffer facts that elicit prejudgment in this case. Therefore, Defendant's service as a witness, without more,¹⁸ does not establish an appearance of bias.

Finally, regarding the Court's statements, neither statement presents an appearance of bias or offends the "reasonable observer." The first statement concerns the Court informing Defendant that he should abbreviate profanity (in order to render its verbal effect harmless) is an often occurring phenomenon in the courtroom. Understandably, when witnesses take the stand they desire to repeat what was said to them verbatim. Nonetheless, whether the witness seeks to impart to the Court the vitriol lacking from colloquial niceties or simply to preserve accuracy, courtroom decorum demands a different result. The Court's direction founded in concern for courtroom

including calling the defendant "scum" on the record, stemmed from telephonic threats the judge's family had endured on behalf of the defendant's associates. *Id.* at 20-21. Even though the judge in *Knighon* deferred to the sentencing council for the appropriate sentence, the Supreme Court reversed and remanded the Pennsylvania Superior Court's affirmance based on the legal requirement that a criminal sentence be imposed by an impartial judge and not a third party. *Id.* at 22.

¹⁷ *Com. v. Darush*, 459 A.2d 727, 731-32 (Pa. 1983).

¹⁸ Defendant did not provide the Court with the circumstances of this case.

decorum does not prove that the Court “bore hostility” towards Defendant sufficient to grant its recusal.¹⁹

The Court’s second statement likewise does not support an appearance of bias. The circumstance underlying the Court’s statement concerning jury confusion was this Court’s advisement to both parties that the Court would not provide explanation to the jury beyond the plain text of the standard jury instructions. The Court intended to communicate to the parties that the burden to provide elucidation regarding how the receiving stolen property count concerned only the items received through use of the gift card while the theft by deception count concerned receipt of the gift card rested on the shoulders of the prosecution as the party bearing the burden.

However, upon reflection, the Court is cognizant of how such a statement could be misinterpreted as “prosecutorial.” Nevertheless, such an interpretation does not establish an appearance of bias. The statement is facially neutral—failing to suggest an outcome—and not derogatory. In fact, it does not even suggest hostility towards Defendant. In cases where the Pennsylvania Superior Court has required recusal based on statements made by the trial court judge, those statements expressly prejudiced the defendant and/or were derogatory in nature.²⁰ Such circumstances are

¹⁹ See *Com. v. Abu-Jamal*, 720 A.2d 79, 90 (Pa. 1998) (finding that the trial judge’s restoration of decorum during trial based on the defendant’s actions did not support a claim of partiality); see also *Com. v. Kearney*, 92 A.3d 51, 61 (Pa. Super. Ct. 2014) (quoting *Liteky v. U.S.*, 510 U.S. 540, 555-56 (1994)) (“judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge”).

²⁰ See, e.g., *Darush*, 459 A.2d at 732 (finding recusal from sentencing was appropriate when trial court judge failed to “affirmatively admit or deny” making derogatory remarks about the defendant to a third party); *Com. v. Bryant*, 476 A.2d 422, 425 (Pa. Super. Ct. 1984) (trial court judge informed defense counsel that the judge had already decided on the defendant’s sentence after the jury returned the verdict and that the judge would schedule sentencing a day before he was to be voted on for reelection because it would garner the judge favor with the public); *Com. v. Berrigan*, 535 A.2d 91, 104-05 (Pa. Super. Ct. 1987) (trial court judge accused the defendant of “subverting justice” in open court and wrote letters to

not present here. Therefore, the proffered circumstances underlying Defendant's motion for recusal, individually and cumulatively,²¹ do not demand the Court's recusal for sentencing purposes.

CONCLUSION

Based on the aforementioned, Defendant's *Motion for Recusal* is **DENIED**. Defendant waived his right to seek recusal in this matter. The sentencing hearing is hereby rescheduled to **August 1, 2019 at 9:00 a.m.** in Courtroom No. 2 of the Lycoming County Courthouse.

IT IS SO ORDERED this 2nd day of July 2019.

BY THE COURT,

Eric R. Linhardt, Judge

cc:

Joseph Ruby, Esq. (ADA)
Jessica Feese, Esq. (APD)
April McDonald, Court Scheduling Technician
Gary Weber, Esq. (Lycoming Reporter)

supporters of the defendants disparaging the defendant).

²¹ *Kearney*, 92 A.3d at 62 (noting as "well-settled" that an amalgamation of meritless claims in the recusal context will not produce a single meritorious claim of error).