IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-0000090-2017**
	:	
vs.	:	
	:	
	:	
JOSEPH SANTORE COLEMAN,	:	
Appellant	:	**1925(a) Opinion**

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

This opinion is written in support of this court's judgment of sentence dated November 20, 2019.

This case arose from the shooting deaths of Shane Wright and Kristine Kibler on October 31, 2016, at 613 Poplar Street in Williamsport, PA.

By way of background, Joseph Coleman (Appellant) called Casey Wilson and directed Wilson to pick him up on Scott Street. Appellant then directed Wilson to Race Street where they picked up Jordan Rawls. Wilson drove Appellant and Rawls to 613 Poplar Street so that Appellant and Rawls could rob Shane Wright, whom Appellant believed was selling marijuana.

Wilson drove to the area of Wright's residence and parked on Trenton Avenue. Appellant directed Wilson, a friend of Wright's, to go inside Wright's residence and determine whether Wright and the other occupants were downstairs and to make sure that the back door was unlocked. Wilson went into the residence for about ten minutes before returning to the vehicle and informing Appellant and Rawls of the whereabouts of the

persons inside the residence.

Appellant and Rawls, each wearing a mask and armed with a firearm, exited the vehicle and entered the residence. While Appellant was on the first floor robbing or attempting to rob Wright, Rawls was at or near the top of the stairs to the second floor.

Kibler's daughter, Cheyanna Wright, and her boyfriend heard Kibler come out of her second floor bedroom and scream. They opened the door of their room and observed a light-skinned, masked gunman (Rawls) holding Kibler at gunpoint. Rawls pointed his firearm at them and they retreated into their bedroom. Shortly thereafter, they heard two gunshots.

Appellant and Rawls ran back to Wilson's vehicle, which was parked on Trenton Avenue. Once both were inside the vehicle, Appellant directed Wilson to drive away.

When Cheyanna Wright and her boyfriend exited their bedroom, they found Kibler in the hallway dying from a gunshot wound and Shane Wright's body in the front doorway. They called 9-1-1.

The police arrived and investigated the shooting.

Appellant was charged with Criminal Homicide (two open counts);[1] Criminal Conspiracy (criminal homicide);[2] Robbery;[3] Criminal Conspiracy (robbery);[4] Criminal Attempt (robbery);[5] Persons not to Possess Firearms;[6] Firearms not to be Carried without a

[1] 18 Pa. C.S.A. §2501(a).
[2] 18 Pa. C.S.A. §903(a)(1).
[3] 18 Pa. C.S.A. §3701(a)(1)(iii).
[4] 18 Pa. C.S.A. §903(a)(1).
[5] 18 Pa. C.S.A. §901.
[6] 18 Pa. C.S.A. §6105(a)(1).

License;[7] and Possessing Instruments of a Crime.[8]

The firearms and instrument of crime charges were severed for trial.

On February 12-15 and 19, 2019, a jury trial was held on all of the charges except the severed charges. At the close of the Commonwealth's case, defense counsel moved to dismiss the charge of conspiracy to commit homicide, which the Commonwealth conceded.[9] The jury found Appellant guilty of conspiracy to commit robbery, robbery, criminal attempt to commit robbery, second-degree murder of Shane Wright, and second-degree murder of Kristine Kibler.

Appellant waived his right to a jury trial on the severed charges. The court conducted a nonjury trial on September 3, 2019, following which the court found Appellant guilty of persons not to possess a firearm.[10]

On November 20, 2019, the court sentenced Appellant to serve consecutive life sentences for the second-degree murder convictions.[11] Appellant filed a post sentence motion, which the court denied on April 7, 2020. Appellant then filed a timely notice of appeal.

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[7] 18 Pa. C.S.A. §6106.
[8] 18 Pa. C.S.A. §907(b)
[9] N.T., 2/14/2019, at 121-122.
[10] The court acquitted Appellant of carrying a firearm without a license. The Commonwealth withdrew the charge of possessing an instrument of crime.
[11] The court sentenced Appellant to 2 ½ to 20 years for conspiracy to commit robbery, 7 to 20 years for robbery, and 5 to 10 years for persons not to possess a firearm. The court ordered these sentences to be served consecutive to each other but concurrent to the life sentences imposed for second-degree murder. No sentence was imposed for attempt to commit robbery due to the prohibition on imposing a sentence on two inchoate offenses designed to commit or culminate in the same crime. 18 Pa. C.S. §906.

Appellant first asserts that the trial court erred in permitting the Commonwealth to amend the criminal information to specify that the gun that Appellant possessed was different than the type of gun that he was originally charged with possessing. The court would rely on the Opinion and Order issued on September 11, 2018.

Appellant next asserts that the trial court erred in denying his motion to dismiss the severed gun charges in violation of Rule 600 based on the Commonwealth's lack of due diligence in failing to bring him to trial within 365 days from the date that the complaint was filed. Again, the court would rely on the Opinion and Order issued on September 11, 2018.

Appellant next avers that the trial court erred in failing to suppress evidence obtained pursuant to a warrant that was defective because it contained intentional, knowing, or recklessly omitted information that provided the basis for probable cause. He also avers that he was deprived of his constitutional right to a hearing because the trial court erroneously denied him a hearing after he made a substantial showing to the court that the affidavit for his arrest warrant contained intentional, knowing or recklessly omitted information that provided the basis for probable cause. These issues were addressed in the Opinion and Order issued on November 13, 2017.

Appellant next contends that the trial court erred in denying his motion for a new trial after the Commonwealth failed to disclose evidence of a recorded witness interview until after trial, which deprived him of the opportunity to investigate the claims made by the witness. This issue was addressed in the Opinion and Order entered on October 25, 2019.

Appellant next claims that the trial court erred in instructing the jury on a

burglary charge when he was not charged with burglary. The Commonwealth charged Appellant with second-degree murder, also known as felony murder, based on the killing being committed while Appellant was engaged as a principal or an accomplice in the perpetration of a felony.[12] The prosecutor argued that Appellant not only committed or attempted to commit a robbery but also that he entered the residence without permission with the intent to commit the crime of theft inside the residence, which constituted a burglary. He asked the trial court to instruct the jury regarding the elements of burglary as part of the second-degree murder charge. He argued that if the jurors did not know the elements of the underlying felonies, they would not be able to determine whether a felony was committed or threatened to be committed. Transcript, 2/15/2019, at 2-3.

Trial counsel[13] argued that the court should not instruct the jury on the elements of burglary because the Commonwealth had not charged Appellant with burglary. He also argued that the statute and the standard charge for second-degree murder were sufficient and there was no need to "get into a definition of burglary." Transcript, 2/15/2019 at 3.

Trial counsel's arguments lacked merit. It is not necessary for a defendant to be charged with or convicted of the underlying felony. *Commonwealth v. Munchinski*, 585 A.2d 471, 483 (Pa. Super. 1990); Pa.SSJI (Crim) §15.2502(B), subcommittee note. However, "[f]or a verdict to be founded on second degree murder, the jury must be instructed

[12] The phrase "perpetration of a felony" is defined as the "act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa. C.S. §2502.

[13] During the jury trial, Robert Hoffa represented Appellant.

as to the elements of the alleged felonies." *Commonwealth v. May*, 656 A.2d 1335, 1343 (Pa. 1995). Since the trial court was ***required*** to instruct the jury regarding the elements of the underlying felonies, it was not error for the trial court to instruct the jury regarding the elements of burglary.

Appellant next asserts that the trial and sentencing court abused its discretion in denying a recusal even though the judge is the administrative judge for the Lycoming County Adult Probation Office and the victim in the case was related to a Lycoming County Probation Officer.

> It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider 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. Where a jurist rules that he or she can hear and dispose of the case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion. In reviewing a denial of a disqualification motion, we recognize that our judges are honorable, fair and competent.

Commonwealth v. Abu-Jamal, 533 Pa. 485, 720 A.2d 79, 89 (1998)(citations omitted).

Appellant did not present any evidence establishing bias, prejudice or unfairness that raised a substantial doubt about the trial court's ability to preside impartially. Appellant's counsel argued that, "although it is not confirmed, I've been advised that one of the victims is related to a Lycoming County probation officer and because Your Honor is part of the Lycoming County Court System, which is a small rural" entity the trial court

should recuse itself from hearing the trial of the severed firearm charges. Transcript, 9/3/19, at 9.

The prosecutor explained that a probation officer's cousins and aunts were part of the victims' extended family; and that he thought the female victim in this case might have been the probation officer's aunt. Transcript, 9/3/19, at 9.

The court stated that it was not aware of any relationship between a probation officer and the victims nor would any such relationship affect its ability to be fair and impartial. The court even noted that it was the administrative judge of the Adult Probation Office but that would not influence the court's ability to judge whoever was going to testify and to judge them fairly and impartially.

The probation officer was neither a victim nor a witness in this case. The court did not have any relationship with any of the probation officer's family members. This is not the type of situation that would require recusal of a jurist.

In *Commonwealth v. Perry*, 468 Pa. 515, 364 A.2d 312 (1976), the Court held that there was no abuse of discretion for a jurist to deny recusal when the victim was an acquaintance and the jurist had attended the victim's funeral.[14] In so holding, the Court stated:

> First, the relationship involved here, that of an acquaintance, does not generate bias or prejudice against a defendant. Moreover, a great deal of difference exists between an acquaintance relationship and those situations which the law recognizes by their nature, carry at least the appearance of impropriety. See *Commonwealth v. Pavkovich*, 444 Pa. 530, 283 A.2d 295 (1971); *Commonwealth v. Snyder*, 443 Pa. 433, 275 A.2d 312 (1971); *In re Crawford's Estate*, 307 Pa. 102, 160 A. 585 (1932); *Davenport v. Meyer*, 4 Lebanon 185 (1953). Second, it would be an unworkable rule which

[14] The victim was a police officer who the jurist knew professionally.

> demanded that a trial judge recuse whenever an acquaintance was a party to or had an interest in a controversy. Such a rule ignores that judges throughout the Commonwealth know and are known by many people, some of whom may eventually be the victims of crime, and assumes that no judge can remain impartial when presiding in such a case. Therefore, the acquaintance between a judge and a victim of a crime, is not, in itself, sufficient to require the trial judge to recuse.

364 A.2d at 317-318. Since an acquaintance between a judge and a victim is not sufficient to require recusal, certainly the victim being an extended family member of an acquaintance of the judge would not be sufficient to require recusal.

Furthermore, the court presided over the bench trial of the firearms offenses; it did not preside over the jury trial of the murder and robbery charges of which the female victim may have been the probation officer's aunt. Although the court sentenced Appellant on all of the charges, the life sentence imposed for second-degree murder was mandatory. 18 Pa. C.S. §1102(b). Moreover, as evidenced by the court acquitting Appellant of carrying a firearm without a license, the court clearly was not biased or prejudiced against Appellant.

In his next four issues, Appellant challenges his conviction for the crime of persons not to possess firearms. Appellant asserts that the verdict was against the weight of the evidence, because the firearm that was recovered was different from the firearm that was used during the incident of the crime. He asserts that the evidence was insufficient and the court erred in denying Appellant's motion in arrest of judgment because the Commonwealth failed to establish beyond a reasonable doubt that he possessed a firearm consistent with the factual scenario established at his preliminary hearing. He also asserts that the verdict was improperly based on a confession that was admitted in violation of the corpus delicti rule. The court addressed these issues in its Opinion and Order entered on April 7, 2020.

Appellant's final issue is that the trial court erred in denying his motion for a change of venue or venire and by precluding him from having a venue hearing, which deprived him of a fair and impartial trial. The court cannot agree.

Appellant filed a motion for a change of venue or venire in Count V (⁋⁋ 53-59) of his Omnibus Pretrial Motion filed on May 3, 2017. On June 21, 2017, the Honorable Nancy L. Butts heard this motion, and she denied it "without prejudice to reinstate during jury selection." Order, 6/22/17, at ⁋7.

Appellant filed another motion for change of venue or venire on July 8, 2019. That motion was originally scheduled for a hearing on October 21, 2019. Appellant's case, however, was on the August 13, 2019 call of the list and the September trial term. Appellant filed an application for continuance seeking to continue the case from the call of the list and the trial term. The prosecutor opposed the continuance request and stated, "The motion can be heard and decided prior to [Appellant's] September trial date. This case has dragged on for too long." The court denied the motion and indicated that it would decide the venue objection during jury selection. Order, 8/6/2019.

Appellant's case was called for jury selection on August 14, 2019 before Judge Butts. Appellant's counsel[15] requested reconsideration of the continuance request. She indicated that she had witnesses for the October 21 hearing date who were not available at the time of jury selection. She indicated that the witnesses would testify with respect the coverage of this case on social media. Transcript, 8/14/2019, at 5-7.

The prosecutor argued this was an old case; it needed to be resolved. He

[15] Following Appellant's jury trial, Mr. Hoffa was permitted to withdraw as Appellant's counsel, and Jeana Longo was appointed to represent him.

suggested selecting or attempting to select a jury because he did not believe that Appellant would be able to meet his burden at the October 21 hearing. Transcript, 8/14/2019, at 7-9.

Judge Butts denied Appellant's request for reconsideration. She noted that many people do not read the newspaper or watch the news anymore. She did not recall seeing anything about Appellant on social media. Furthermore, the best evidence regarding the pervasiveness of any pretrial publicity would come from the jurors indicating whether they had seen or heard anything. Transcript, 8/14/2019, at 5-6, 9-11.

After Judge Butts made her ruling, Appellant waived his right to a jury trial. Transcript, 8/14/2019, at 13-28. When Judge Butts asked Appellant's counsel if she knew of any reasons the court should not grant Appellant's request to waive his right to a jury trial, the following exchange occurred:

> MS. LONGO: No, Your Honor, but I would just like to add that he does consent to Judge Lovecchio proceeding over his case only in light of your rulings today. So he's not waiving his objections that I—
> THE COURT: On the venire and venue issue.
> MS. LONGO: Right.

Transcript, 8/14/2019, at 26.

On September 3, 2019, Appellant appeared before the trial court for a bench trial on the firearms charges. Prior to the presentation of testimony, Appellant's counsel "renewed" her objection to a judge from Lycoming County presiding over Appellant's trial. Counsel argued that the trial judge was also part of Lycoming County, and that there was extensive and inflammatory media coverage, including on the internet and social media. She also noted that she had been advised that a probation officer was related to the victims. Transcript, 9/3/2019, at 3-10.

The trial judge denied the renewed objection. The trial judge noted that he did not participate in social media. Although the judge was sure articles had been in the paper and he even might have read some of them, he would let the evidence in the courtroom prove or disprove what happened versus what he may have read in the media. He noted that it is difficult for the media to get everything correct. Their editor's job is different than the court's job, and the way the media presents things are different from the way the parties introduce evidence in court. Therefore, any media coverage would not have anything to do with how the judge decided the case. Transcript, 9/3/2019, at 10-11.

Appellant's assertion that the trial court precluded him from having a venue hearing is simply not accurate. On two separate occasion, the court informed Appellant that it would address his motion for change of venue or venire at the time of jury selection. The first occasion was in the Order entered on June 22, 2017. The second occasion was in the Order entered on August 6, 2019, denying Appellant's continuance request. Despite such notice, Appellant did not present any evidence at the time of jury selection to support his claims. Although Appellant's witnesses allegedly were unavailable at the time of jury selection, Appellant did not even attempt to present any documentary evidence of the pretrial publicity such as newspaper articles or print outs or screen shots of the information on websites or social media. He also did not make a detailed proffer of his witnesses' proposed testimony. Furthermore, he waived his opportunity to determine the extent of the jurors' exposure to any publicity when he waived his right to a jury trial.

Appellant's argument that the trial court erred or abused its discretion by

denying or deferring the motion for a change of venue or venire until the potential jurors were questioned lacks merit. The Pennsylvania Supreme Court has set forth the following standards regarding motions for change of venue or venire:

> The trial court's decision on appellant's motions for change of venue/venire rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion. In reviewing the trial court's decision, our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity.
>
> A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. **Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury.** In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice.
>
> Pretrial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.
>
> Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the defendant also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated. **In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question.** This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. **Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective.** The discretion of the trial judge is given wide latitude in this area.

Commonwealth v. Robinson, 581 Pa. 154, 195-96, 864 A.2d 460, 484 (2004)(emphasis added), quoting *Commonwealth v. Drumheller*, 570 Pa. 117, 808 A.2d 893, 902 (2002)(internal citations omitted), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003); see also *Commonwealth v. Clemons*, 200 A.3d 441, 468-471 (Pa. 2019); *Commonwealth v. Walter*, 623 Pa. 174, 119 A.3d 255, 269-291 (2015); *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 314 (2011).

There is absolutely nothing in the record to suggest that the publicity in this case was so extremely damaging that a change of venue was warranted without investigating what the potential jurors would say about their ability to hear the case fairly and without bias. Moreover, all of the publicity specifically referenced in Appellant's 2019 motion was from four to six months prior to jury selection, making it even less likely that the publicity would still be fresh in the jurors' or the court's minds.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Jeana Longo, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)