SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURT HOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0664

Kevin L. Dickens
Delaware Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977
Pro Se Plaintiff

Ophelia M. Waters, Esquire
Aaron R. Goldstein, Esquire
Deputy Attorneys General
820 North French Street, 6th Floor
Wilmington, Delaware 19801
Attorneys for Defendants

Re: *Dickens v. Costello, et. al*
C.A. No. 97C-06-063 RRC

Submitted: June 25, 2004
Decided: July 20, 2004

On Plaintiff's "Motion for Mistrial."

DENIED.

Dear Mr. Dickens, Ms. Waters and Mr. Goldstein:

Currently before this Court is Kevin L. Dickens' ("Dickens") motion for a

new trial, which was filed with this Court on June 18, 2004.[1] Superior Court Civil Rule 59 states in part:

> Rule 59. New trials
> (a) Grounds. -- A new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court.
> (b)The Court shall determine from the motion, answer, affidavits and briefs, whether a new trial shall be granted or denied or whether there shall be oral argument on the motion.

Dickens claims four grounds for the granting of his motion: (1) "improper ex-parte communication between the Court and a correctional officer;" (2) "the jury was improperly impaneled;" and (3) "the jury was rushed by the Court into a verdict and it failed to deliberate properly;"and (4) "the jury verdict form confused [the] jury into answering wrongly."

Dickens, who is presently incarcerated at the Delaware Correctional Center ("DCC"), filed a *pro se* complaint in 1997 against several corrections officers ("Defendants") employed by the State alleging civil rights violations pursuant to 42 U.S.C. §1983. In his complaint, Dickens alleged that he was "physically

---

[1] Dickens has titled his motion as a motion for mistrial; generally, a motion for mistrial is made during the course of a trial that "brings [the trial] to an end, without determination on the merits, because of a procedural error or serious misconduct during the proceedings" before a verdict had been rendered. After a verdict is rendered, a party should move for a new trial pursuant to Superior Court Civil Rule 59. As noted by Defendants, Dickens has not requested a new trial; however, given that Dickens is proceeding *pro se*, this Court has determined Dickens' motion as if it had been filed as a Rule 59 motion for new trial.

tortured and brutalized" by Defendants during his intake processing at the Howard R. Young Correctional Institution on June 12, 1995.

On June 7, 2004, this Court commenced a four-day trial, which ended with a unanimous verdict in favor of Defendants. The jury consisted of twelve jurors and two alternates. The jury was impaneled after an extensive *voir dire* in which an additional partial jury pool was needed to fill out the jury. Defendants, represented by counsel, and Dickens, acting *pro se*, exercised their right to impanel a jury of their choosing. Dickens and Defendants had the opportunity to request special *voir dire* questions; however, Dickens did not ask for a question about prior law enforcement involvement. The jury was impaneled without objections from either party.

Immediately prior to the trial, this Court was informed by Lieutenant Keith Hoffer ("Lt. Hoffer")[2] of the Delaware Department of Correction of an altercation involving Dickens and officers from DDC, which occurred on the weekend prior to the start of trial. Dickens also informed the Court of this incident that occurred on the weekend prior to trial, in which Dickens claims to have been assaulted by DCC officers. Dickens asked the Court for a "protective order" or "restraining

[2] Dickens refers to a "Lt. Hoffman" in his motion; however, as there is no "Lt. Hoffman" but a Lt. Keith Hoffer of the Department of Corrections who supervises the transport of prisoners to and from the courthouse; the Court presumes that Dickens is referring to Lt. Keith Hoffer.

order" against the DCC officers involved in the alleged assault. This Court denied that "motion."

Dickens now claims that "the Court had an improper ex parte communication with Court Correctional Officer Lt. [Hoffer] and [the Court] was 'briefed' that Plaintiff had been involved in [an] assault with [a] guard on the weekend before trial."[3] Dickens claims that the "brief[ing]" by Lt. Hoffer "slanted the Court and caused bias toward Plaintiff."[4] Dickens alleges that the Court "extended special commendations in deference to State Defendants' witnesses."

Defendants argue that the communication was not improper by contending that Dickens has a "history of confronting, and occasionally assaulting, state employees."[5] Defendants further contend that "[i]t is within the province and duty of the Court to ascertain what security measures may be required at trial."[6] Defendants also contend that Dickens has not applied the correct legal standard for a showing of bias and disqualification.[7]

The Court did not engage in an improper communication with Lt. Hoffer

---

[3] Pl's Motion for Mistrial at 1 (hereinafter "Pl's Mot. at _").

[4] Pl's Mot. at 1.

[5] Defendants' Opposition Brief at ¶ 3 (hereinafter "Opp. Br. at _").

[6] Opp. Br. at ¶ 3.

[7] Opp. Br. at ¶ 3.

and Dickens was not prejudiced or biased by the communication. It is a fundamental tenant that "a judge is presumed to be impartial."[8] This Court noted that Dickens did not raise this allegation at trial and the Court was not given an opportunity at that time to review the claim and conduct the following examination of the claim.[9] Under the Delaware Judges' Code of Judicial Conduct, Canon 3(4) a judge "should accord to every person who is legally interested in a proceeding, or to the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." The Delaware Supreme Court has held that when an allegation of bias or prejudice is made against a judge, "the trial judge must follow a two-step analysis to determine whether disqualification is appropriate because of personal bias for or against a party."[10]

First, the bias or prejudice [alleged against the Court] must be against a

---

[8] *Sand v. Martin*, 1982 Del. Fam. Ct. LEXIS 33 *1-2 (quoting *United States v. Hall*, 424 F. Supp. 508, *aff'd* 536 F.d2 313, *cert. denied* 429 U.S. 919).

[9] *Cf. Beck v. Beck*, 766 A.2d 482 (Del. 2001) (holding that "[a]s a general rule, the trial judge must first have an opportunity to address allegations of bias before [the Delaware Supreme Court] will intervene").

[10] *Beck*, 766 A.2d at 484.

party, not to any views relating to the subject matter involved.[11] Second, the bias must be a personal one, not judicial. A mere allegation of "judicial bias" is not a sufficient ground for recusal.[12] The bias must also "stem from an extrajudical source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[13]

Dickens has not presented any evidence to demonstrate that this Court showed any bias or prejudice against him. Dickens' only example of prejudice is his unsupported contention that the Court "extended special commendations in deference to State Defendants' witnesses." He does not explain or give any instances of these alleged "special commendations." The Court has a duty toward the public, the litigants, counsel and court personnel to ensure a safe and secure environment. The Court was concerned about security in the courtroom during trial and it was incumbent upon Lt. Hoffer to notify the Court of the incident involving Dickens. In addition, the information that was presented to the Court by Lt. Hoffer was also presented to the Court by Dickens. This Court did not have a

---

[11] *Sand*, 1982 Del. Fam.. Ct. LEXIS *2 (quoting 48A C.J.S. Judges § 109 (1981)).

[12] *Sand*, 1982 Del. Fam.. Ct. LEXIS *2 (quoting *United States v. Falcone,* 505 F.2d 478 (3rd Cir. 1974), *cert. denied* 420 U.S. 955 (1975).

[13] *Sand*, 1982 Del. Fam.. Ct. LEXIS *2 (quoting *United States v. Grinnell Corp.,* 384 U.S. 563 (1978).

personal bias toward Dickens, it made no decision regarding the outcome of the case based on the information provided by Lt. Hoffer and the Court learned the same information provided by Lt. Hoffer from its "participation in the case."

Dickens claims that the jury was improperly impaneled. He asserts that jurors number 3, 5, 8, 10 and Alternate number 2 "failed to disclose close affiliation with law enforcement during jury voir dire."[14] He argues that these alleged failures to disclose "allowed jurors with hidden agendas to be impaneled."[15]

Defendants argue that there is no basis for Dickens' claim that the jury was improperly impaneled.[16] Defendants contend that Dickens is claiming the jury was improperly impaneled and somehow biased against him based solely upon the fact that he received an unfavorable verdict.[17]

The Jury was properly impaneled and Dickens claim is without merit. Dickens' claim that jurors 3, 5, 8, 10 and Alternate number 2 "failed to disclose close affiliation with law enforcement during jury voir dire" is unsupport by any

---

[14] Pl's Mot. at 2.

[15] Pl's Mot. at 2.

[16] Defs' Opp. At ¶ 4.

[17] Defs' Opp. At ¶ 4.

evidence presented by Dickens. Dickens does not explain where he received the information of the alleged non-disclosures, nor in what capacity these jurors were allegedly affiliated with law enforcement. More importantly, Dickens never requested special *voir dire* questions , nor did he object to the inclusion of jurors 3, 5, 8, 10 and Alternate number 2. The jury was impaneled after extensive *voir dire* which required a second partial panel of prospective jurors to be called in order to fill out the jury. The jury was ultimately impaneled without objection and by consent of both parties. To the extant that Dickens may have been entitled to question potential jurors about possible law enforcement ties, or that he should have been given information about possible ties, Dickens has waived any claim of error by not objecting at trial or before trial. Dickens' claim that the jury was improperly impanel is groundless and without merit.

Dickens claims that the jury was rushed by the Court into a verdict and it failed to deliberate properly.[18] Dickens contends that "with [a] State holiday fast approaching on Friday (the jury received the case on Thursday), [the] Court began to improperly put parties, especially Plaintiff, "on the clock" and [to] rush proceedings."[19] Dickens claims that the jury "was kept in Court until 2:20 p.m.

---

[18] Pl's Mot. at 3.

[19] Pl's Mot. at 3.

before it was allowed to break for lunch, [at which time] "[t]he jury was told that deliberations would not begin until after lunch."[20] Dickens argues that "[a]ssuming that the jury completed lunch at approximately 3:00 p.m., the jury deliberated for roughly ten minutes."[21] Dickens also argues, as part of his third ground for a new trial, that he was not allowed to call George Martino as a rebuttal witness because the Court was "rush[ing] the proceedings."

Defendants argue that Dickens "disingenuously blames the Court for the time at which the jury received the case for deliberations."[22] Defendants claim that "[i]t was the Plaintiff's consistently repetitive, cumulative discourse that caused significant delay."[23] Defendants contend that Dickens attempted to "put on improper rebuttal evidence during his rebuttal case" by trying to call Martino as a witness.

Dickens' claim that the jury was rushed by the Court into a verdict and it failed to deliberate properly is without merit. Dickens has not presented any evidence that the jury was "kept in Court until 2:20 p.m.," nor has he presented any evidence that the Court told the jury that deliberations would not begin until

---

[20] Pl's Mot. at 3.

[21] Pl's Mot. at 3.

[22] Defs' Opp. At ¶ 5.

[23] Defs' Opp. At ¶ 5.

after lunch. Dickens' claim that the jury did not finish lunch until 3:00 p.m. and that it only deliberated for ten minutes is pure speculation and devoid of any support. Even if those assertions were true, such facts do not warrant a new trial. This Court denied his request to call Martino as a rebuttal witness because Dickens did not proffer a proper reason to call Martino. The Court found that if Martino had pertinent information that would have been helpful to Dickens, that Dickens had the right to call Martino as his witness. Dickens, however, relied on Defendants to call Martino as a witness. Dickens cannot now claim that he was somehow prejudiced because Defendants did not call Martino as a witness when he failed to call Martino as his witness in his case in chief.

Dickens argues that the heading of the verdict form somehow confused the jury into thinking that it should answer no to the first question if all the members of the jury were not in agreement. The heading states, "Do you unanimously find from a preponderance of the evidence the following?"[24] The first question states, "Do you find that any of the individual defendants' contact, if any, with the Plaintiff on June 12, 1995 was force that was clearly excessive, sadistic or malicious under circumstances as you have found them at the time?"[25] Dickens

---

[24] Pl's Mot. at 3.

[25] Pl's Mot. at 3.

argues that the answer to the heading of the verdict form should be a "yes" if the jury is unanimous but the answer to the first question is a "no" if the jury was unanimous. His argument is that a juror could have answered "no" to the first question believing that he or she was voting in favor of Dickens' claim.

Defendants argue that Dickens "specifically approved the form of the verdict sheet and at no time objected to the order of the questions as set forth in the jury verdict form."[26] Defendants further argue that "[t]here is no basis to argue that the verdict was less than unanimous, nor is there any evidence to indicate that the jury failed to comprehend the verdict sheet or the instructions."[27]

Dickens' claim that the "jury verdict form confused [the] jury into answering wrongly" is without merit. Dickens' had an opportunity to object to the verdict form before it was presented to the jury, as well as having an opportunity to submit potential questions for the verdict form. Superior Court Civil Rule 51 states in part:

> No party may assign as error the giving or the failure to give an instruction unless a party objects thereto before or at the time set by the Court immediately after the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the party's objection.

---

[26] Defs.' Opp. at ¶ 6.

[27] Defs.' Opp. at ¶ 6.

Dickens approved the verdict form without objection; therefore he has waived his right to claim error. Dickens' claim is unsupported conjecture on his part. He has offered no proof that any juror was confused. In fact, the jury was polled, at Dickens' request, after it had returned its verdict. Each juror answered affirmatively to the question, "Do you find that any of the individual defendants' contact, if any, with the Plaintiff on June 12, 1995 was force that was clearly excessive, sadistic or malicious under circumstances as you have found them at the time?" There was no confusion evident that any of the jurors thought they were voting in Dickens' favor or that any juror was confused by the verdict form.

For the forgoing reasons, Dickens' "Motion for Mistrial" (Motion for a New Trial) is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary