

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellant :
: v. :
: CECELIA MARIE MOORE, :
: Appellee : No. 839 MDA 2012

Appeal from the Order entered April 23, 2012
in the Court of Common Pleas of Luzerne County,
Criminal Division, at No: CP-40-CR-0002579-2011

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellant :
: v. :
: JOSEPH POLISKY, :
: Appellee : No. 840 MDA 2012

Appeal from the Order entered April 30, 2012
in the Court of Common Pleas of Luzerne County,
Criminal Division, at No: CP-40-CR-0000235-2011

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA
Appellant :
: v. :
: DONNA HELLER, :
: Appellee : No. 1101 MDA 2012

Appeal from the Order entered May 16, 2012
in the Court of Common Pleas of Luzerne County,

Criminal Division, at No: CP-40-CR-0001785-2011

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
SHAWN FRANCIS GRANAHAN,	:	
	:	
Appellee	:	No. 1102 MDA 2012

Appeal from the Order entered April 27, 2012
in the Court of Common Pleas of Luzerne County,
Criminal Division, at No: CP-40-CR-0002807-2011

BEFORE: MUNDY, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: February 11, 2013

The Commonwealth of Pennsylvania (the Commonwealth) appeals from the orders entered in the Court of Common Pleas of Luzerne County by the Honorable Lesa Gelb denying its motions for recusal in four separate cases.¹ We affirm.

* Retired Senior Judge assigned to the Superior Court.

¹ Our Supreme Court has held that the Commonwealth is entitled to an interlocutory appeal as of right from a trial court's denial of the Commonwealth's motion for recusal, provided the Commonwealth complies with Pa.R.A.P. 311(d) and certifies in its notice of appeal that the denial of the motion would substantially handicap its prosecution of the case. **See Commonwealth v. White**, 910 A.2d 648, 655 (Pa. 2006). Additionally, a panel of this Court determined that an order denying the **Commonwealth's** motion for recusal is appealable under Pa.R.A.P. 313, collateral orders, because the Commonwealth will be precluded on double jeopardy grounds from seeking review of its motion if the defendant is acquitted. **Commonwealth v. Stevenson**, 829 A.2d 701, 704 (Pa. Super. 2003) (emphasis added).

At issue on this appeal are four separate criminal cases presently awaiting trial before Judge Gelb. The cases are unrelated, but are consolidated before this Court by virtue of the fact that an officer involved in each case, at some point prior to the filing of these cases, had been sued civilly in federal district court by an individual represented by Judge Gelb's husband, Attorney Barry Dyller.² Upon discovering this information, the

² At CP-40-CR-0002579-2011, Appellee Moore was charged with driving under the influence of alcohol (DUI), 75 Pa.C.S. § 3802(a)(1), and operation following suspension of registration, 75 Pa.C.S. § 1371(a), by Officer Robert L. Evans, Jr. of the Newport Township Police Department. In 2008, Officer Evans was a named defendant in a civil rights suit filed by Attorney Dyller in the United States District Court for the Middle District of Pennsylvania. The suit, captioned at ***A. Doe v. Wozniak, Evans, and Luzerne County***, No. 3:08-CV-1951, was resolved in 2009 and ultimately dismissed on September 22, 2009.

At CP-40-CR-0000235-2011, Appellee Polisky was charged with DUI, 75 Pa.C.S. §§ 3802(a)(1) and 3802(c), by Officer John Karasinski of the Kingston Borough Police Department. In 2002, Officer Karasinski was a named defendant in a civil rights suit brought before the United States District Court for the Middle District of Pennsylvania, captioned at ***Yagloski v. Scalzo, et al.***, No. 3:02-CV-01603. Officer Karasinski was dismissed as a defendant on January 2, 2003, following a deposition by Attorney Dyller. The suit itself was dismissed with prejudice by order dated August 6, 2004.

At CP-40-CR-0001785-2011, Appellee Heller was charged with endangering the welfare of children, 18 Pa.C.S. § 4304(a)(1), and various summary offenses by Patrolman Marc Labar of the Wilkes-Barre City Police Department. In 2008, Patrolman Labar was sued civilly by Attorney Shelley L. Centini and the Dyller Law Firm in the United States District Court of the Middle District of Pennsylvania. The suit was captioned at ***Soldyn v. Labar*** and docketed at 3:09-CV-00906. Attorney Dyller entered his appearance on the case; however, on November 4, 2009, the Dyller Law Firm moved to withdraw representation prior to the case reaching trial. This motion was granted on January 7, 2010.

Commonwealth filed motions requesting Judge Gelb recuse herself from all four cases. Judge Gelb denied the Commonwealth's motions. The Commonwealth filed timely notices of appeal in each case.³ On June 26, 2012, the Commonwealth filed its application for consolidation with this Court. On July 17, 2012, Commonwealth's motion was granted and the above-captioned cases were consolidated into the present appeal.

On appeal the Commonwealth asks us to consider whether the trial court abused its discretion in denying its motions for recusal. Commonwealth's Brief at 4.

The Supreme Court has held that:

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

At CP-40-CR-0002807-2011, Appellee Granahan was charged with DUI, 75 Pa.C.S. § 3802(a)(1), and various summary offenses by Officer Dion Fernandes of the Pittston City Police Department. Officer Fernandes was a named defendant in *Slavoski v. Fernandes and Galli*, 3:05-CV-00646, a civil rights suit filed in the United District Court of the Middle District of Pennsylvania by Attorney Dyller in 2005. This case was settled out of court in 2007 for an undisclosed amount.

³ The trial court did not order the Commonwealth to file a concise statement pursuant to Pa.R.A.P. 1925(b) at any of the four cases, and none was filed. The trial court did file an 1925(a) opinion at each case.

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 a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.

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

The inquiry is not whether a jurist was in fact biased against a party, but whether, even if actual bias or prejudice is lacking, the conduct or statement of the court raises “an appearance of impropriety.” ***In the Interest of McFall***, 617 A.2d 707, 712 (Pa. 1992). The rule is simply that “disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality.” ***Commonwealth v. Bryant***, 476 A.2d 422, 425 (Pa. Super. 1984).

Citing to Canon 3(C) of the Code of Judicial Conduct⁴, the Commonwealth argues that Judge Gelb’s marriage to an attorney “with a

⁴ **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:

(a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(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;

(c) they know that they, individually or as a fiduciary, or their spouse or minor child residing in their household, have a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) they or their spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Our Supreme Court has noted that

Canon 3 C, like the whole of the Code of Judicial Conduct, does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by a *judge* in his *self-assessment* of whether he should volunteer to recuse from a matter pending before him. The rules do not give standing to others, including Superior Court, to seek compliance or enforcement of the Code because its provisions merely set a norm of conduct for all our judges and do not impose substantive legal duties on them.

Reilly by Reilly v. Se. Pennsylvania Transp. Auth., 489 A.2d 1291, 1298

(Pa. 1985) (emphasis in original).

prior pecuniary interest in opposition to police witnesses involved in these cases” gives the appearance of impropriety necessitating recusal. Specifically, the Commonwealth claims,

[Attorney Dyller] represented plaintiffs in civil rights law suits alleging serious misconduct by the police officers expected to testify in the present cases. In those suits, Attorney Dyller had a clear interest in challenging the officers’ credibility, and in some cases ultimately received a financial gain through the settlement. Judge Gelb was and remain[ed] married to Attorney Dyller during the time the lawsuits were pending and settled, and remains married to him today. Therefore, the judge herself received a financial benefit from some of the suits.

Commonwealth’s Brief at 11. The Commonwealth goes on to note that “it is likely that the judge and her husband discussed the [cases] and the accused officers at some point while the suits were pending, and that the judge was exposed to allegations of misconduct by the officers . . . [which may color] the judge’s decisions on the officers’ upcoming trial testimony.” *Id.* Thus, the Commonwealth requests that this Court reverse Judge Gelb’s orders denying recusal.

In each of the four cases, Judge Gelb determined that the Commonwealth failed to meet its burden under *Abu-Jamal, supra*, stating that she “has no doubt that she can and will hear and dispose of this case fairly and without prejudice.” Trial Court Opinion (CP-40-CR-0002579-2011), 4/23/2012, at 3 (unnumbered). *See also* Trial Court Opinion (CP-40-CR-

0000235-2011), 5/7/2012, at 4 (unnumbered); Trial Court Opinion (CP-40-CR-0001785-2011), 5/16/2012, at 4 (unnumbered); Trial Court Opinion (CP-40-CR-0002807-2011), 5/11/2012, at 4 (unnumbered). Specifically, with regard to the Commonwealth's allegations of impropriety, Judge Gelb stated as follows.

At the time the Commonwealth presented its motion to [Judge Gelb], [she] pointed out that she had never heard of the federal lawsuit that the Assistant District Attorney brought to her attention, nor had she ever heard of the affiant police officer. [Judge Gelb] has no opinion whatsoever about the police officer or about the merits of the criminal case before this court; nor has the [trial court] read the Complaint that the Commonwealth attached to its motion in support of this recusal. [The trial court] was never familiar with the affiant nor does she wish to familiarize herself with any information that she was never privy to relative to the prior lawsuits.

Moreover, [the trial court] has no doubt that she can and will hear and dispose of this case fairly and without prejudice In addition, having contemplated this issue thoroughly, [the trial court] is confident that a significant minority of the lay community could not reasonably question the [trial court's] impartiality in this matter for several reasons.

* * *

The Commonwealth merely speculates about the discussions that have occurred between [Judge Gelb] and her husband. There was no proof offered of such conversations, and [Judge Gelb] assured the Commonwealth that she was totally unfamiliar with the federal lawsuit[s] and with the affiant[s]. Further, the Commonwealth speculates that [the trial judge] will preclude evidence at the time of trial, prejudicing the Commonwealth. This, too, is conjecture Finally, the Commonwealth alleges that [Judge Gelb] gained financially as a result of the prior federal lawsuit[s]; however, [Judge Gelb] was not aware of the suit nor is she familiar with what settlement[s],

if any, may have been reached. For these reasons, the Commonwealth has failed to meet its burden.

Trial Court Opinion (CP-40-CR-0000235-2011), 5/7/2012, at 3, 2 (unnumbered). **See also** Trial Court Opinion (CP-40-CR-0000235-2011), 5/7/2012, at 4 (unnumbered); Trial Court Opinion (CP-40-CR-0001785-2011), 5/16/2012, at 4 (unnumbered); Trial Court Opinion (CP-40-CR-0002807-2011), 5/11/2012, at 4 (unnumbered).

Judge Gelb's statements constitute her conscientious determination that she can hear each case and render an impartial verdict. Such determination is unassailable on appeal. **See *Abu-Jamal***, 720 A.2d at 89. Because there is no evidence of record that demonstrates a reasonable appearance of impropriety, we must conclude that Judge Gelb did not abuse her discretion in refusing to recuse herself from the four above-captioned cases. **See *Commonwealth v. Jones***, 663 A.2d 142 (Pa. 1995) (the fact that the Justice's name had appeared on papers in connection with movant's conviction, which had occurred while the Justice was the District Attorney of Philadelphia County, did not warrant the Justice's recusal from participation in the movant's case before our Supreme Court, absent a showing that the Justice had any direct personal contact with movant's file during his prosecution and conviction); **see also *Commonwealth v. Darush***, 459 A.2d 727 (Pa. 1983) (holding that recusal was not required of a trial judge even though the trial judge formerly, as District Attorney, had personally

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prosecuted the defendant on charges unrelated to the matter presently before him and had been the District Attorney when the offenses in question were committed).

Accordingly, we affirm the orders of court denying recusal.