STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 3, 2013)

STATE OF RHODE ISLAND	**:**	
	:	
vs.	**:**	**P1/12-1218 B**
	:	
DONNA UHLMANN	**:**	

DECISION DENYING
DEFENDANT'S MOTION TO RECUSE

KRAUSE, J. Defendant Donna Uhlmann entreats this Court to recuse itself from the instant case, claiming that the Court's impartiality was compromised when it denied codefendant Gerard Donley's motion for a new trial after he had been convicted this past June of conspiring with Uhlmann to obstruct justice and to bribe a witness, along with those substantive offenses. In denying that motion on July 2, 2013, the Court found that there was more than ample evidence to support the jury's verdict on all counts. Uhlmann, with her own trial fast approaching, now complains that the Court has prejudged the outcome of her case and should withdraw from it. The Court disagrees.

The defendant has completely ignored the law attendant to new trial motions, has misread the record, and has manufactured flawed and unsupported assertions which, in the larger context of a new trial hearing, are entirely out of place. The United States and Rhode Island Supreme Courts, together with scores of other state and federal appellate courts, have disallowed such empty challenges, and for the reasons set forth herein this Court denies Uhlmann's unsubstantiated motion.

It is axiomatic that trial judges should recuse themselves if they are unable to render a fair or impartial decision. Mattatall v. State, 947 A.2d 896, 902 (R.I. 2008). It is, however, "an equally well-recognized principle that a trial justice has as great an obligation **not** to disqualify himself or herself when there is no sound reason to do so." Kelly v. RIPTA, 740 A.2d 1243, 1246 (R.I. 1999), citing Mattatall (emphasis in original).

The Rhode Island Supreme Court has made clear that in order to support a recusal demand, the proponent of such an imprecation shoulders a substantial burden:

> "The party seeking recusal bears the burden of establishing that the judicial officer possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair his or her impartiality seriously and to sway his or her judgment." State v. Howard, 23 A.3d 1133, 1136 (R.I. 2011) (internal quotation omitted).

The proponent must demonstrate that the purported impartiality is "so extreme as to display clear inability to render fair judgment." United States v. Howard, 218 F.3d 556, 566 (6th Cir. 2000), quoting Liteky v. United States, 510 U.S. 540, 555 (1994). In Liteky, the same trial judge had presided over the prior prosecution of one of the defendants in 1983 on unrelated but similar charges. The defendants alleged that in the earlier proceeding the judge had displayed "impatience, disregard for the defense, and animosity" and had imposed an excessive sentence. They demanded that the judge recuse himself when the defendants were about to be tried before him on similar charges in 1991 (vandalism of government property under the guise of political protest).

The trial judge denied that motion, as well as a renewed disqualification motion made during the retrial after the judge had admonished defense counsel and two pro se defendants in front of the jury for overstepping relevancy boundaries the judge had

established prior to trial. The United States Supreme Court held, without any dissent, that no recusal was required, explaining:

> "First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required…when no extrajudicial source is involved. Almost invariably they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id. at 555.

The mere fact that a judge has already presided over the separate jury trial of a codefendant hardly constitutes reasonable grounds for questioning that judge's impartiality in a subsequent trial of the remaining codefendant. United States v. Cowden, 545 F.2d 257, 265-66 (1st Cir.), cert. denied, 430 U.S. 909 (1977); Paradis v. Arave, 20 F.3d 950, 958 (9th Cir. 1994) ("[T]he judicial system could not function if judges had to withdraw from a case whenever they had presided in a separate trial in the same case."); Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998); People v. Neumann, 499 N.E.2d 487, 492 (Ill. App. Ct. 1986).

In United States v. Wilson, 77 F.3d 105 (5th Cir. 1996), defendant Michael Wilson's trial had been severed from that of his codefendants, who were tried first. Wilson's recusal motion was based on the trial judge having ruled on a number of motions in the earlier trial which were substantially identical to the ones Wilson intended to pursue at his trial. The trial judge had also been privy to information in the codefendants' presentence reports that implicated Wilson. Wilson particularly focused on the judge's comment during the codefendants' sentencing hearing when he said, "Mike Wilson's primary responsibility was in the cocaine and cocaine base end." Wilson

claimed that the comment indicated that the judge had predetermined his guilt. His motion for recusal was summarily denied by the trial judge, and the Fifth Circuit Court of Appeals found no basis, in either the Due Process Clause or in recusal decisional law, to hold that the trial judge had abused his discretion in denying the recusal motion. The Court said, citing Liteky and other cases:

> "Opinions formed during the prior proceedings do not constitute a basis for statutory recusal unless the opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible. This Court has recognized that a trial judge is not disqualified because he presided over the trial of a codefendant or accepted the guilty plea of a codefendant and that, absent allegations that the judge harbored a personal bias that would disqualify him, the denial of a motion to recuse is not error." Wilson, 77 F.3d at 111.

Further, and quite apart from the United States Supreme Court's clear directives in Liteky, there are legions of cases in myriad contexts which hold that a trial judge's evaluation of witnesses, codefendants, as well as defendants themselves at prior proceedings will not mechanically provoke that judge's disqualification at a subsequent proceeding. In Kelly v. RIPTA, supra, after the jury had returned a verdict in favor of the defendants, the trial justice granted plaintiff's motion for a new trial. In ruling on the motion, the judge found that part of the defendant's testimony was not credible. The defendants' motion to recuse the trial justice from the second trial was denied, and that denial was affirmed on appeal. The Rhode Island Supreme Court held that the trial justice's earlier credibility determination did not establish bias or prejudice, stating:

> "In the case at bar both defendants have failed to establish any personal bias or prejudice on the part of the trial justice. He reviewed the evidence subsequent to the rendition of a verdict in *Kelly I.* He commented on the evidence and weighed the credibility of witnesses as he was required to do on such a motion. The fact that he commented on the credibility of the [defendant's] bus driver and the weight of the evidence

> in respect to liability did not establish any personal bias or lack of impartiality on his behalf." 740 A.2d at 1246.

In United States v. Pulido, 566 F.3d 52 (1st Cir. 2009), Pulido challenged the impartiality of the district court because of a comment in a different, though related, case where the court had described him as "a thoroughly corrupt police officer." Pulido claimed that the statement, which had been made prior to his own sentencing, required recusal. The First Circuit disagreed and, reciting Liteky's language, said, "This is not a close case" for recusal. See United States v. Ransom, 428 Fed.App'x 587 (6th Cir. 2011) (Adverse credibility findings that the trial court made about the defendant's testimony a year earlier when he had been a witness at his brother's revocation hearing did not establish bias or prejudice warranting recusal.).

In United States v. Alvarado, 134 Fed.App'x 461, 462 (2d Cir. 2005), the defendant alleged that the trial justice was biased based on "excessive and unsupported findings" he had made about his credibility as a cooperating witness in a previous trial. Relying on Liteky, the Second Circuit held that the findings were made during a prior judicial proceeding and failed to show any antagonism that would make fair sentencing impossible. Accord, United States v. Lucas, 62 Fed.App'x 53 (4th Cir. 2003) (In a previous trial of the same defendant, the trial justice had found during a suppression hearing that defendant's testimony was not credible. Citing Liteky − that judicial rulings alone are not a valid basis for recusal − the Court found no evidence of unequivocal antagonism that would render fair judgment impossible.). In United States v. Mirkin, 649 F.2d 78, 82 (1st Cir. 1981), the defendant complained that an adverse ruling in his pretrial

suppression motion demonstrated the trial judge's prejudice. No recusal was required:

> "Making credibility assessments is daily grist for a trial judge. In any case or proceeding in which the defendant testifies, the judge, almost as a reflex process, will form an opinion about the defendant's credibility. Such determinations should not, of course, be based on bias or prejudice, but prejudice does not inevitably arise as a result of forming a credibility opinion. A judge often must make a finding about the defendant's credibility in a pretrial suppression hearing, but, to our knowledge, no court has held that this, without more, disqualifies him from presiding at the trial." 649 F.2d at 82.

In United States v. Burnette, 518 F.3d 942, 945 (8th Cir. 2008), the trial judge had found defendant's testimony at a codefendant's sentencing hearing not credible. The Court of Appeals held that no error had occurred when the trial judge did not subsequently recuse himself at the defendant's own sentencing hearing. The Court also remarked: "Rules against 'bias' and 'partiality' can never mean to require the total absence of preconception, predispositions and other mental habits." In similar fashion, the Rhode Island Supreme Court, in State v. Crescenzo, 114 R.I. 242, 258-62, 332 A.2d 421, 431-32 (1975), in the context of considering a new trial motion, said:

> "The remarks made by the trial justice were based solely on the facts adduced at trial. He had listened to the defendant and [witness], observed their demeanor and based his opinion as to who was telling the truth on what he had seen and heard in the courtroom during the time of the actual trial . . . It is the nature of the judicial process for a judge who hears a case to form an opinion as to [the] merit[s] of the controversy which often requires an assessment of the conduct of the litigants." Id.

A trial judge's prior credibility determinations have also not prevented the same judge from rehearing or retrying the matter after remand by an appellate court. Howard, 218 F.3d at 566. There, after the defendant's conviction for sexual assault had been vacated, he moved for the trial justice's disqualification from the retrial because the judge had previously remarked that the victim was "highly credible." The Sixth Circuit upheld

the trial court's recusal denial, pointing out that the Supreme Court had clearly accepted the long-standing practice of the same judge continuing to handle the case after remand: "It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." Liteky, 510 U.S. at 551. Unless the trial court's remarks derive from an extrajudicial source or are laced with such an elevated degree of favoritism or antagonism as to make fair judgment impossible, "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." Liteky, 510 U.S. at 555.

Similar results are obtained in the context of post-conviction relief hearings and federal habeas proceedings under 28 USC § 2255. Pursuant to Rule 2.3(d)(4) of the Rhode Island Superior Court Rules of Practice, applications for post-conviction relief are to be submitted "for disposition by the justice who presided at the trial of the applicant." See Pezzucco v. State, 652 A.2d 977, 979 (R.I. 1995) (Trial justice's purported interest in upholding his own rulings is not a basis for recusal from a post-conviction relief hearing).

Pursuant to Rule 4(a) of the Federal District Court Rules governing § 2255 proceedings, "The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant." Justice Kennedy, in his concurrence in Liteky, said, "As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues. See Rules Governing Section 2255 Proceedings for the United

States District Courts, Rule 4(a).” 510 U.S. at 1161. See Polizzi v. United States, 926 F.2d 1311, 1321-22 (2d Cir. 1991) (“[T]he trial court’s ‘recollection and observation, checked against the record and memory of counsel, . . . may be a valuable aid to a § 2255 determination,’” quoting United States. v. Delsanter, 433 F.2d 972 (2d Cir. 1970).

* * * * *

In sum, unless defendant Uhlmann can somehow show that this Court harbors, as Liteky proscribes, a “deep-seated antagonism” such that it is impossible for it to preside fairly at her trial, her bias challenge is without any basis. Significantly, she makes absolutely no such claim in her motion, nor can she demonstrate one, as the July 2, 2013 record is wholly bereft of any suggestion or hint of personal bias or antagonism on the part of the Court. And, most assuredly, nowhere in the *entire* record of this case can Uhlmann identify even a grain of the requisite impartiality or enmity “so extreme as to display [this Court’s] clear inability to render fair judgment.” Liteky, 510 U.S. at 555.

When Donley urged this Court to cede him a new trial, the Court was mandated to make findings and rulings based upon the evidence presented at that trial. Uhlmann apparently holds a misguided belief that because the Court assessed witness credibility when it considered Donley’s new trial motion, it has therefore prejudged the credibility of those witnesses who may also testify in her case. Any such notion is baseless.

A trial justice is mandated to independently weigh and evaluate the evidence, including the credibility of witnesses, when considering a motion for a new trial. State v. Dicarlo, 987 A.2d 867, 870 (R.I. 2010). In so doing, the Court is also obliged to explain its reasoning on each point. Id. Recusal does not thereafter lie simply because the Court fulfilled its judicial obligations. Mattatall, 903 A.2d at 902-903.

In deciding Donley's motion, the Court found that the evidence, particularly Donley's own trial testimony, justified the jury's conclusion that he and Uhlmann had conspired to commit and did commit the offenses charged in the indictment. Unsurprisingly, there was inculpatory reference by the Court regarding Uhlmann. After all, the indictment alleges that she and Donley were co-conspirators and participated in criminal activity together. Most of the Court's comments and findings, however, were devoted not to her, but to an explication of Donley's self-destruction at trial, before the grand jury and during his recorded meeting with Michael Drepaul at the Wyatt Detention Center.

The transcript of the Court's findings and conclusions encompasses thirty-one pages. Uhlmann's name isn't even mentioned in an inculpatory fashion until twenty-four pages have been turned. And, those subsequent references are made straightforwardly, without varnish, and in full accordance with and precisely as mandated by our Supreme Court in the context of rendering decisions on new trial motions. Dicarlo, 987 A.2d at 870; Kelly, 740 A.2d at 1246; Crescenzo, 332 A.2d at 431-432.[1]

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[1] The defendant's motion asserts that "the Court found the evidence overwhelming that Attorney Gerard Donley had colluded with Attorney Donna Uhlmann." The defendant embellishes the record. The Court said, focusing on Donley, not Uhlman: "Gerard Donley's testimony did nothing to dispel that conclusion [that the evidence apart from his testimony was sufficient to convict him]. In fact, he only made things worse for himself. I have already alluded to some of the pieces, and I need not expand the pages of this record to neatly catalog or calibrate the rest of it here. It is there for any reviewing court to read, standing grimly and without much credibility, in stark contrast to what, in my view, is overwhelming evidence of guilt." (July 2, 2013 Tr. at 30.)

Moreover, any statement which the Court made about Uhlmann was in full keeping with our Supreme Court's directives in, *e.g.*, Dicarlo and Kelly. See Ransom, supra, (court's statements did not establish partiality, "especially when they are viewed in the larger context of the [prior] hearing, which shows both that the judge gave a thorough, well-reasoned, and fair-minded explanation for his adverse credibility finding and that the [defendants] provided the judge with the factual predicate for his statements." 438 Fed.App'x at 591(emphasis added); Neumann, supra, 499 N.E.2d at 492 ("Taken in context the court's statements…indicate no prejudice") (emphasis added). Uhlmann, on the other hand, has utterly failed to view the Court's findings in their proper context, as limned by rules governing the consideration of motions for a new trial.

Moreover, the evidence at Uhlmann's trial will most certainly be profoundly different from that at Donley's trial. It must be borne in mind that, in large part, Donley's conviction was a result of his own making. As this Court said at the hearing on his motion for a new trial:

> "This case is not about Michael Drepaul; it is not about Nicole 'Coco' Brown. It is about Gerard Donley. It is about whether Gerard Donley's testimony was credible and whether he was entitled to have it accepted by the jury. What is fact or fiction, and what testimony is or is not credible is a task that is quintessentially entrusted to juries. Plainly, this jury rejected Gerard Donley's testimony, and there was ample reason to reject it." (July 2, 2013 Tr. at 15.)

In the end, as this Court found, Donley ran afoul of the Mattatall prophecy:

> "When a defendant elects to testify, he runs the very real risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth. As long as there exists some other evidence of the defendant's guilt, disbelief of a defendant's sworn testimony is sufficient to sustain a finding of guilt. A trier of fact is not compelled to accept and believe the self-serving stories of vitally interested defendants. Their evidence may not only be disbelieved, but from the totality of the circumstances, including the manner in which they testify, a contrary conclusion may be properly drawn." (July 2, 2013 Tr. at 29-30, quoting Mattatall, 603 A.2d at 1109.)

Agreeing with the jury's verdict that Donley and Uhlmann were co-conspirators was not, as Uhlmann unwisely believes, some purposeful prejudicial remark gratuitously offered by the Court. Rather, it was a factual determination that the Court was, by law, obligated to make in the context of Donley's motion for a new trial. Dicarlo, 987 A.2d at 870; Kelly, 740 A.2d at 1246. Making such determinations on the basis of facts from a prior proceeding does not, as the United States Supreme Court has held, constitute a valid

basis for recusal at the subsequent trial of a remaining codefendant. Liteky, 510 U.S. at 555. As Justice Scalia wrote:

> "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.' Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. Liteky, at 550-551 (internal quotation omitted).

To claim recusal just because the Court ruled, as it was required to do, by weighing evidence and assessing witness credibility at the Donley trial − and without so much as a particle or speck of the requisite antagonism or personal animus which is Liteky's prerequisite for a partiality challenge − in no way establishes, as Uhlmann must, that this Court "possesses a personal bias or prejudice by reason of a preconceived or settled opinion of a character calculated to impair its impartiality seriously and to sway its judgment." Howard, 23 A.3d at 1136; Cowden, 545 F.2d at 266. No case invites such a conclusion, and decisional law clearly contemplates a contrary result.

All that has occurred is that this Court merely presided at a codefendant's trial and offered a ruling on that codefendant's post-trial motion, a ruling which was confined to and restricted to the evidence in *that* trial of *that* codefendant. Suggesting recusal of this Court at the subsequent trial of a remaining codefendant is groundless. Cowden, 545 F.2d at 265-66; Paradis, 20 F.3d 950; Wilson, 77 F.3d at 111.

Put plainly, and renewing the sentiment expressed by the First Circuit in Pulido, this isn't even a close case. 566 F.3d at 62. To accede to Uhlmann's barren, unsupported request for recusal in this case would do scant justice to Chief Justice Weisberger's explicit admonition to avoid withdrawal when there is simply no sound reason for it. Kelly, 740 A.2d at 1246.

For all of the foregoing reasons, defendant Uhlmann's motion to recuse is denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Donna Uhlmann**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 3, 2013**
JUSTICE/MAGISTRATE:	**Krause, J.**
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